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IN THE

Supreme Court of the United States

October Term, 1962.

No. 230

BOSTON AND MAINE RAILROAD ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts.

JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the District of Massachusetts, entered on March 13, 1962, dismissing the plaintiffs' amended complaint and the complaint of The New York Central Railroad Company, intervening plaintiff, brought to set aside an order of the Interstate Commerce Commission prescribing divisions of joint rates of railroads, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

The opinion of the District Court for the District of Massachusetts is not yet reported, and is set forth as Appendix A, page 1a, *infra*. The report of the Interstate Commerce Commission, *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I. C. C. 491 (1960), is reproduced as Appendix C, page 30a, *infra*.

JURISDICTION.

This action was brought under 28 U. S. C. §§ 1336, 1398, 2284, and 2321-2325, to enjoin, set aside, annul, and suspend an order of the Interstate Commerce Commission. The judgment of the three-judge District Court (Appendix B, page 29a, *infra*) was entered on March 13, 1962, and notice of appeal was filed in that court on May 10, 1962. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. §§ 1253 and 2101(b). The following decisions, among others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Florida East Coast Ry. v. United States*, 234 U. S. 167; *United States v. Chicago, M., St. P. & Pac. R. R.*, 294 U. S. 499; *American Trucking Assns. v. United States*, 364 U. S. 1.

STATUTE INVOLVED.

The statute here involved, which is the source of the power of the Commission to prescribe divisions of joint rates between or among railroads, is Section 15(6) of the Interstate Commerce Act, 49 U. S. C. 15(6), 41 Stat. 486, and reads as follows:

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

QUESTIONS PRESENTED.

1. Could the Interstate Commerce Commission, in prescribing divisions of joint rates, consistently with its authority under Section 15(6) of the Interstate Commerce Act, with the requirements of the Administrative Procedure Act, and with the due process guaranteed by Article V of the Amendments to the Constitution of the United States, act in disregard of and outside the record before it and base its order upon its earlier conclusions in another case involving different joint rates, without having introduced or designated or identified in the record before it the record in the earlier proceeding or the portions thereof on which it based its decision, without evidence to sustain its assumptions of similar circumstances, contrary to uncontroverted evidence of substantial dissimilarity of conditions, despite admitted error in its estimate of future cost relationships on which its earlier conclusions were based, and despite its having reopened such other case for possible revision of the order therein in the light of the cost relationships in later years?

2. Could the Interstate Commerce Commission, acting under Section 15(6) of the Interstate Commerce Act, which requires it to give "due consideration" to matters going to relative costs of service, lawfully prescribe divisions of joint rates as between groups of railroads, as between individual railroads, or on particular traffic of individual railroads, in entire disregard of the uncontroverted evidence respecting the cost relationships of such railroad groups, of such individual railroads, and of the individual railroads in the handling of the particular traffic, respectively?

3. Where it appears from the report of the Interstate Commerce Commission that it did not rest its conclusions in any degree upon any of the other matters to which Section 15(6) of the Interstate Commerce Act requires it to

give "due consideration", could the Commission, in prescribing divisions of joint rates wholly inconsistent with the uncontroverted evidence of cost-of-service relationships, effect compliance with the requirement of Section 15(6) that "due consideration" be given to matters going to relative costs of service by mere recitals or summaries in its report of the tenor of such evidence and without findings or conclusions explaining its reasons for disregarding all such demonstrated cost-of-service relationships?

4. Where intraterritorial joint rates are currently divided among the participating railroads under non-uniform individual agreements and without any primary division as between railroads of different groups, could the Commission, upon the complaint of only two railroads of one group, consistently with the requirements of Section 15(6) of the Interstate Commerce Act as interpreted by the Supreme Court of the United States,

(a) prescribe a uniform basis of divisions as between each of the complainants, on the one hand, and, on the other, all railroads named as defendants, as a group, without the consent of the latter to be treated as a group, without evidence to show that the circumstances as to any particular defendant or defendants making a separate defense as to their joint rates with a complainant are similar to those relating to all defendants, in disregard of the uncontroverted dissimilarities shown of record by such defendant or defendants, and without findings in the terms of the statute that the existing divisions are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial "as between the carriers parties hereto" and that the divisions prescribed will be the just, reasonable, and equitable divisions "to be received by the several carriers"?

(b) prescribe a primary group basis of divisions of such intraterritorial rates in which only one complainant and one defendant participate, over the protest of the de-

fendant whose circumstances are not shown to be similar to those of all defendants as a group, without first finding that the particular divisions now accruing to "the carriers parties thereto" are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the individual carriers involved, and that the divisions prescribed will be the just, reasonable and equitable divisions "to be received by the several carriers"?

5. Could the Commission infer that each division of every intraterritorial joint rate in which a complainant and one or more of numerous defendants participate is unjust as between the particular participants, even if it be assumed that in the aggregate the existing divisions of all such rates brought in issue by the complaint appear to be unjust?

STATEMENT OF THE CASE.

A. The Group Divisions Previously Fixed in No. 29885.

The divisions prescribed by the Commission in the case at bar (I. C. C. No. 32055, *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I. C. C. 491 (1960), Appendix C, p. 30a, *infra*) are the same as those fixed by it 7 years earlier in finding 2 in No. 29885 upon another record involving other joint rates. *Offical-Southern Divisions*, 287 I. C. C. 497, 547, 552 (1953), 289 I. C. C. 4, 9 (1953).[1] Appendix C, pp. 58a, 59a, *infra*.

No. 29885 was an investigation begun by the Commission in response to a petition of Northern railroads for a reopening of I. C. C. No. 24160, *Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175, 176, 231 (1939). In No. 24160 the Commission had prescribed higher group divisions of *interterritorial* rates for southern than for northern railroads for equal hauls and had also applied those divisions to *intra*territorial rates between stations

1. The order of the Commission of January 28, 1960, in No. 32055, the instant case, is reproduced as Appendix D, p. 59a, *infra*.

on the territorial border and stations in southern territory in which northern lines participated.[2]

On the later record in No. 29885 the Commission concluded that the relatively higher costs there shown for the northern group for 1946 and 1948 represented a transient condition and that for the future the costs in both territories would be substantially equal. It thereupon fixed divisions of the interterritorial rates, and also of the southern intraterritorial border-point rates, which placed equal value on northern and southern lines' services for equal hauls. *Official Southern Divisions*, 287 I. C. C. 497, 526, 546-547, 552; 289 I. C. C. 4, 8-9.

In 1959, in response to an earlier petition of northern lines which sought opportunity to prove that group costs were higher in the North than in the South, the Commission reopened No. 29885 for further hearing.[3]

B. Basis of the Commission's Action in the Instant Case.

In the case at bar the Commission's order, made on the complaint of two southern railroads, the Louisville & Nashville (L. & N.) and Atlantic Coast Line (A. C. L.), requires establishment of the No. 29885 equal-factor basis of group divisions for dividing the intraterritorial rates between a few border stations and all stations on the northern railroads in Official (northern) territory.[4] This

2. Typical of such southern intraterritorial border-point rates were those from Cincinnati to Richmond (both border-points) over the Chesapeake & Ohio (a northern line) and from thence over southern railroads to interior stations in the South (234 I. C. C. 199-200).

3. As the hearing before the court below took place on January 30, 1961, the instant record does not show the later facts that the further hearings in No. 29885 were concluded on February 13, 1961, and that the report of the Examiners is now awaited.

4. An example of these Official intraterritorial border-point rates would be rates over the L. & N. from Louisville to Cincinnati (both border points) and from thence over northern lines to stations in Official territory.

order was essentially based upon acceptance of the southern complainants' theory that since the Commission in No. 29885 had prescribed those divisions on southern intraterritorial border-point traffic, it should here fix the same basis for dividing complainants' Official intraterritorial border-point rates. In reaching this conclusion the Commission disregarded the fact that, contrary to its expectation of an equality of costs as between the northern and southern groups for the future, when deciding No. 29885, the uncontroverted evidence of record here showed that the costs of the northern group had continued increasingly and substantially to exceed those of the southern group (ICC Ex. 48[5]; App. C, p. 53a, *infra*). Similarly it disregarded the uncontroverted evidence that group costs as applied to the traffic of the complainants with all defendants, and individual lines' costs as applied to the separate traffics of the L. & N. with individual northern defendants, developed proportions of total costs for the complainants not in excess of their proportions of total revenues under existing divisions (Appendix C, pp. 51a-53a, *infra*). The Commission's decision takes no account whatsoever of the admitted fact that the No. 29885 divisions, here prescribed, would in each instance accord the southern complainants proportions of total revenues far greater, and northern lines far less, than their respective proportions of total costs as applied to the respective traffics (Amended Complaint, paragraph XI, admitted in U. S.-I. C. C. Answer; RR Vol. 1, pp. 34, 82[6]).

As its reason for disregarding this uncontroverted cost evidence the Commission stated that such group costs and

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5. No other pagings being presently available for the transcript of hearing and exhibits before the Commission, all transmitted to this Court as original papers, this statement will designate them as "ICC Tr.", and "ICC Ex.", respectively.

6. Reference to pages of the transcript of record from the court below are indicated by the prefix "RR".

individual lines' costs were "not determinative of the costs of these particular movements". But its order required establishment of the *inter-group* divisions theretofore fixed in No. 29885 which were in no way related to present conditions affecting the particular traffic here involved. Although the record contained evidence of relative costs dealing specifically with the handling of the important Automobile Parts traffic from the Ford plant at Detroit (Dearborn, Mich.) to Louisville (ICC Exs. 108, 126), the Commission gave it no consideration, and its report does not mention it, but only the L. & N. evidence which it answers.

Such conclusions as the Commission made concerning similarity of conditions as between the instant case and No. 29885 (App. C, pp. 47a, 56a, 57a, *infra*) are assumptions without support in the record, and are contrary thereto and to the Commission's own findings. The report recognizes that the differences in average hauls and in relative circuity (relation of actual hauls to short-line distances) are such that the No. 29885 divisions (which were designed to produce equality) would, as applied to the instant traffic, greatly over-compensate complainants and under-compensate northern defendants (App. C, p. 47a, *infra*). To show similarity the L. & N. relied upon assumed movements, largely in connection with the Baltimore & Ohio (B. & O.), at assumed rates (ICC Ex. 3, middle block, pp. 1-15, 20-23; ICC Tr. 449). Actually there is very little movement of this sort involving the B. & O. (ICC Ex. 60, pp. 7-11). Also, as concerns relative volume of movement, the report itself finds that "the New York Central handled 88 loaded cars from the border points to the North [which would be subject to the divisions here prescribed] for every loaded car handled from the border points to the South" [now subject to the No. 29885 divisions] (App. C, p. 48a, *infra*).

Neither the record in No. 29885 nor any portions thereof were introduced or designated or identified in the

record before the Commission in the instant case, nor does its report herein identify in any way the facts or findings therein on which it based its present decision. If all the facts and findings stated in the several reports of the Commission in No. 29885[7] were deemed proper subjects for official notice, there are no such facts or findings therein as would support the Commission's conclusions herein on the subject of similarity of conditions in the two proceedings with respect to traffic moving on border-point rates.[8]

C. Evidence Respecting Traffic of Individual Railroads.

The New York Central Railroad (N. Y. C.) did not consent to the Commission's treating its divisions with the two southern complainants as a part of the divisions of the northern group of railroads, but made a separate defense with respect to its traffic with the L. & N. and asked separate findings dealing therewith. In this connection it developed relative costs for itself and the L. & N. and showed, among other things, that with respect to the traffic involved which concerned only the N. Y. C. and the L. & N. the latter under existing divisions received a proportion of the total revenues exceeding its proportion of their total costs, and that under the No. 29885 divisions sought by complainants the L. & N. would receive a proportion of total revenues far in excess of its cost proportion. Both the Pennsylvania (P. R. R.) and the Detroit, Toledo & Ironton (D. T. & I.) railroads also presented similar evidence.

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7. *Official-Southern Divisions*, 287 I. C. C. 497; 289 I. C. C. 4; 291 I. C. C. 90; 294 I. C. C. 739; 298 I. C. C. 83.

8. The only facts concerning the southern intraterritorial border-point rates to which the No. 29885 divisions were made applicable are those stated in the 1939 report in the previous proceeding, I. C. C. No. 24160, *Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175, 199-201, to which the Commission's report in the instant case makes no reference. But had such facts been officially noticed here they would not support the Commission's findings concerning similarity of conditions.

relating to their respective traffics with the L. & N. which produced comparisons of generally similar character. In addition the D. T. & I. presented cost evidence of more specific nature covering the movement of its Automobile Parts traffic from Detroit to Louisville (ICC Ex. 126). All this evidence was uncontroverted. Both the N. Y. C. and the D. T. & I. asked separate findings and separate determination of the lawfulness of their divisions with the L. & N. in their respective supplemental exceptions to the report of the Examiner proposing prescription of the No. 29885 group basis of divisions. In prescribing the No. 29885 divisions for application in this case as between the complainants and all northern railroads as a group, the Commission made no findings that the conditions respecting the separate traffics of the N. Y. C., the P. R. R., and the D. T. & I. railroads with the L. & N. were similar to or properly represented by the conditions of the northern railroads as a group on the L. & N. traffic involved, nor did it make findings in the terms of Section 15(6) that the existing divisions are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial "as between the carriers parties thereto" and that the divisions prescribed will be just, reasonable, and equitable divisions "to be received by the several carriers". The separate supplemental petitions of the N. Y. C. for reconsideration and oral argument and of the D. T. & I. for modification of report and order with respect to D. T. & I.-L. & N. traffic were denied by the Commission along with northern defendants' general petition for reopening for oral argument and reconsideration.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents novel questions concerning the scope and limits of the power of the Commission to prescribe divisions of joint rates of railroads, the prompt resolution of which is important to the proper administration of Section 15(6) of the Interstate Commerce Act and to the effectuation of the Congressional purpose and policy to ensure the maintenance of a national system of adequate railroad transportation.

The expanded authority to prescribe such divisions, contained in Section 15(6), was given the Commission by the Transportation Act, 1920, 41 Stat. 486, and was an indispensable mechanism provided by Congress for attaining its new railroad policy as therein manifested. This was specifically recognized by this Court in *New England Divisions Case*, 261 U. S. 184, 189-192. This authority empowers the Commission from time to time to redistribute as between railroads or groups of railroads the revenues from their joint rates in the light of their relative conditions—including their relative service costs and revenue needs—and thereby to relieve their inequalities of opportunity and ability to provide the standard of railroad service envisioned by Congress.

I.

In empowering the Commission to prescribe divisions the Congress did not leave it with only such usual general standards as that the divisions fixed be such as the Commission might find to be "just, reasonable, and equitable". In addition, it specified certain categories of facts to which it mandatorily required the Commission to give "due consideration" as prerequisite to a valid exercise of the power. One of these—"the amount of revenue required [by the carriers concerned] to pay their operating expenses, taxes, and a fair return"—includes the element of *relative costs*

of the service,[9] which the Commission itself has long regarded as "a paramount consideration", "a prime factor", "the factor of primary importance", "a vital factor", and "vitally important" in the determination of divisions.[10]

Questions 1, 2 and 3 raise the issue whether the Commission, acting under Section 15(6), which requires it to give "due consideration" to matters going to relative costs of service, may lawfully prescribe divisions of joint rates (a) as between groups of railroads, (b) as between individual railroads, and (c) on particular traffic of individual railroads, in entire disregard of the uncontroverted evidence respecting the cost relationships of such railroad groups, of such individual railroads, and of the individual railroads in the handling of the particular traffic, respectively.

The Commission here adopted and prescribed the same *group* divisions it had previously fixed in Docket No. 29885 which were based on its conclusions therein 7 years earlier wherein it assumed, on a consideration of relative group costs for *1946 and 1948*, that an equality of costs would obtain for the future as between the northern and southern railroad groups. *Official-Southern Divisions*, 287 I. C. C. 497, 526 (1953). In so doing it completely disregarded the uncontroverted group costs here of record for later years which prove the Commission's earlier assumption to have been erroneous and which establish that the costs of the northern group have continuously exceeded those of the southern group and are now substantially greater (ICC Ex. 48, App. C, p. 53a, *infra*, and Paragraph VII of Amended Complaint which is admitted in U. S.-I. C. C. Answer, RR, Vol. 1, pp. 31, 82). Further, prior to its decision herein the Commission had reopened No. 29885 for further hearing on

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9. *Divisions of Freight Rates*, 156 I. C. C. 94, 100-101.

10. *New England Divisions*, 66 I. C. C. 196, 198, 199; *Divisions of Freight Rates*, 203 I. C. C. 299, 335; *Southwestern-Official Divisions*, 234 I. C. C. 135, 148; *Official-Western Trunk Line Divisions*, 269 I. C. C. 765, 776; *Official-Southwestern Divisions*, 287 I. C. C. 553, 565.

the petition of northern lines for opportunity to prove that group costs were higher in the North than in the South.

Also, in here adopting the old basis of group divisions fixed in No. 29885, the Commission completely and admittedly disregarded the uncontroverted evidence that the present group costs *as applied to the traffic of the two complainants* develop cost proportions for the complainants less than their proportions of total revenues under existing divisions (App. C, pp. 52a, 53a, 55a).

Further, the group divisions here prescribed would apply, among others, to joint rates and traffic in which only individual complainant and defendant railroads participate. Nevertheless, the Commission completely disregarded the uncontroverted relative costs for such individual railroads as applied to such rates and traffic.

While the report of the Commission recites the proportions of total costs borne and the proportions of total revenues received by the individual carriers and carrier groups participating in the traffic, it admittedly gave no consideration to them (App. C, pp. 52a-53a, 55a, *infra*). In each of these instances the Commission sought to explain its admitted disregard of such group and individual railroads' costs on the ground that they did not relate exclusively to the *particular traffic* involved (App. C, p. 55a, *infra*). That this alleged justification for ignoring the evidence of record was completely baseless appears from the fact that the Commission did not undertake to fix divisions responsive to the facts here of record (including relative costs) with respect to the *particular traffic*, but instead fixed the same group-to-group basis of divisions it had previously fixed in No. 29885, despite its admittedly erroneous estimate therein of future cost relationships, and despite its having reopened that earlier case for possible correction in light of the group cost relationships in later years.

Further, as to the important *Automobile Parts* traffic from the Detroit area to Louisville, as to which the record provided relative costs with respect to the *particular traf-*

fic, the Commission wholly disregarded such costs and made no finding concerning their import nor stated any reasons for giving them no consideration.

Resolution of this question does *not* turn upon the weight to be given the cost evidence—a matter for the Commission's determination—since it admittedly gave it no consideration whatsoever. Nor can the Commission's action be upheld on the ground that it is not required to make relative costs controlling, since the group basis of divisions prescribed does not rest upon any facts shown by this record but on the Commission's having theretofore prescribed that basis upon another, earlier, and obsolete record not here before it.

Question 3 raises the further issue whether the Commission can make a valid divisions order, without genuine consideration and in complete disregard of uncontroverted evidence of relative service costs, by mere recitals or summaries of the import of such evidence and without findings or conclusions validly explaining its reasons for disregarding such demonstrated cost relationships.

The substantial changes in conditions affecting rail transportation which have occurred in later years have measurably and unequally affected the relative abilities of the several territorial groups of railroads to provide the standard of public service contemplated by Congress. This has already resulted in divisions cases before the Commission of broad scope and collectively involving virtually all the railroads in the country and many millions of dollars of carrier revenue. In the resolution of these controversies relative costs of service afford a particularly significant yardstick or common denominator for measuring not only the relative contributions of the participants in performing the joint service, but also their relative abilities to maintain adequate service for the public under the conditions that exist from time to time. Accordingly, in these various divisions cases the parties, at great labor and expense, generally prepare and present extensive evidence of relative

service costs. But, if the requirement of "due consideration" of facts embracing costs of service, as contained in Section 15(6), means nothing, and if the Commission—despite its frequently expressed regard for relative costs as a primary criterion of fair and equitable divisions—is free at its sole option or whim completely to disregard such evidence, the parties should know of it so that they may not be put to the labor and expense of producing such cost evidence.

II.

Questions 4(a), 4(b) and 5 raise questions as to the scope of the Commission's power under Section 15(6). In common, they present the question whether the action of the Commission herein, as upheld by the court below, is in conflict in principle with the extent, and the prerequisites to an exercise, of that power as interpreted by this Court.

In *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 82-83, this Court held that in the prescription of "divisions of numerous joint rates applicable to traffic passing through gateways between different territories the Commission may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories *upon evidence which it reasonably may deem typical* and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate." (Italics inserted.) Thus, the Commission could make an order as to the whole *if, and only if, the part in evidence were deemed typical or representative of the whole.*

Here a corollary of that rule would appear to apply to the effect that particular situations shown to be different from and not typified by the basis underlying a general group determination may not be subsumed under and foreclosed by the latter. The question is whether, even assuming there were otherwise a lawful basis for fixing uniform divisions of the *intra*territorial joint rates here involved

as against *all defendants as a group*, the Commission could lawfully prescribe such group divisions on the traffic of individual defendant railroads making a separate defense without findings of similarity or typicality of conditions as between all defendants as a group and such individual defendants making a separate defense, and without findings in the terms of the statute that the existing divisions are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial "as between the carriers parties thereto" and that the divisions prescribed will be the just, reasonable, and equitable divisions "to be received by the several carriers".

Here the Commission made no such findings in the terms of the statute nor any findings of typicality of conditions as between all defendants as a group and the individual defendants making a separate defense. Nevertheless, the Court below sustained it in these omissions.

Question 5 further points up the conflict between the Commission's action in this case, as upheld by the court below, and the requirements of Section 15(6) as interpreted by this Court. Thus in *Brimstone R. R. Co. v. United States*, 276 U. S. 104, 117, this Court held that—

> "It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust."

Yet here, contrary to the uncontroverted costs of record for those individual railroads concerned, and without any basis therefor or findings to support it, the Commission has obviously made just such an inference with respect to the individual traffics and rates of complainant Louisville & Nashville with defendants New York Central, Pennsylvania, and Detroit, Toledo & Ironton, respectively. Further, with respect to the particular joint rates on Automobile Parts from Detroit to Louisville, in which only the Detroit, Toledo & Ironton as originating line, the Pennsylvania as

intermediate line, and the Louisville & Nashville as delivering line are concerned, the record contains relative costs reflecting among others the specific terminal costs of the originating and delivering lines (I. C. C. Ex. 126). These relative costs, which were uncontroverted by any cost evidence, showed a proportion of total costs for the Louisville & Nashville on the traffic moving on those particular rates which was not greater than its proportion of the total revenues under the existing divisions of such rates. Despite these facts, the Commission in this instance also indulged the same inference contrary to the principle stated by this Court in the *Brimstone* case.

The failure of the Commission to make findings in the terms of the statute respecting present and prescribed divisions for the several participating carriers for which specific evidence was presented, is not to be justified on the ground stated by the court below—that such divisions were *primary* divisions and that thus the findings were to be understood as applying to each several carrier in the group. Contrary to the court's assumption, the existing divisions of the intraterritorial rates involved are *not primary* divisions as between railroads of the northern and southern groups, but are non-uniform divisions provided by individual agreements between or among the several participating carriers. In this situation observance of the duty to make findings in the terms of the statute would serve the substantial purpose of directing the Commission's attention to the facts of record with respect to traffic concerning particular carriers and thus enable it to make the quasi-jurisdictional findings dealing with the propriety or impropriety of requiring uniform divisions on such traffic. Only such findings would serve the end objective of the statute, would comply with the principle of the typical evidence rule of the *Beaumont* case, and facilitate rather than impede judicial review. *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 82; *Florida v. United States*, 282 U. S. 194, 215; *United States v. Chicago, M. St. P. & Pac. R. R.*, 294

U. S. 499, 511; *Securities Commission v. Chenery Corp.*, 332 U. S. 194, 196-197; *Secretary of Agriculture v. United States*, 347 U. S. 645, 652-654.

In order that parties to divisions cases may know the extent of the Commission's power to prescribe group divisions of joint rates which involve only individual railroads for which separate presentations of evidence are made, and may know that the prerequisites to an exercise of such power under the principles of the *Beaumont* and *Brimstone* cases still obtain, this Court should rule on these questions.

III.

The Due Process aspect of Question 1 arises from the Commission's having acted in disregard of and outside the record before it, in that it based its order herein upon its earlier conclusions in No. 29885—a different proceeding involving different joint rates and another period of time—without having introduced or designated or identified in the record before it the record in No. 29885 or the portions thereof on which it based its decision.

The findings of the Commission relating to *similarity of conditions* in the instant case to those in No. 29885 (App. C, pp. 47a, 56a, 57a, *infra*) are *pure assumptions* without support in the record, which is to the contrary, not only with respect to relative group costs (ICC Ex. 48) and volume of traffic movement on border-point rates (ICC Ex. 3, middle block; ICC Ex. 66, p. 711; ICC Tr. 449) but also as to relative hauls and relative circuity (relation of actual hauls to short-line distances), and this the report of the Commission confirms (App. C, pp. 47a, 48a, 53a, *infra*).

No evidence from No. 29885 was introduced, or designated, or referred to in the instant record, nor did the Commission, in its report in the case at bar, cite any findings in the reports in No. 29885, that would even remotely tend to show that the unfair results which would ensue from applying No. 29885 divisions to the instant traffic

were in any way matched by, or comparable with, the results of applying those divisions to the southern border-point traffic. Further, even if all factual recitations in the several reports in No. 29885 were regarded as the subject of official notice by the Commission in the instant case, *there are no such facts or findings stated therein* as would enable the Commission to find—as it does in effect here—that the inequities of applying the No. 29885 divisions to the instant traffic were in any way paralleled in the application of those divisions to the border-point traffic in No. 29885.

Accordingly, what evidence, if any, the Commission took into account in making its findings of similarity cannot be known. It is disclosed neither in the report in the instant case nor in the reports in No. 29885. This procedure violated the basic principles of *Ohio Bell Tel. Co. v. Pub. Util. Comm'n. of Ohio*, 301 U. S. 292, 300-305, since reenforced by the Administrative Procedure Act.

It is clear that, in these respects also, the Commission's arbitrary exercise of power, in a manner contrary to constitutional guarantees and statutory standards as interpreted by this Court in analogous situations, raises questions of grave importance to the carrier interests concerned and to the integrity of the administrative process as well as to the public interest in an adequate transportation system as expressed by Congress.

IV.

Taken together, the questions presented by this appeal raise the eminently substantial issue whether, consistently with its statutory duty and administrative function, the Commission, in prescribing divisions of joint rates, may lawfully base its action solely upon its former conclusions on another and earlier record in another case involving other joint rates, in complete disregard of the substantially different current conditions disclosed by the later record before it.

The importance of this question to the public, even apart from its due process aspect, is found in the necessity for the Commission's acting upon a consideration of current conditions as shown of record, rather than upon former conclusions on other records now obsolete, if the divisions-fixing power is to be exercised so as to serve, rather than to subvert, the transportation policy of the Congress.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are so substantial and are of such public importance as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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PROOF OF SERVICE.

I, Joseph F. Eshelman, one of the attorneys for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of July, 1962, I served the foregoing Jurisdictional Statement on each adverse party by depositing in a United States mailbox a copy thereof, with first class postage prepaid, duly addressed to counsel of record for each such party at his post office address, as follows:

1. On Appellee the United States of America, by mailing by regular mail copies to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., and a copy each to W. Arthur Garrity, United States Attorney, and Paul J. Redmond, Assistant United States Attorney, both at the Federal Building, Boston, Massachusetts.

2. On Appellee the Interstate Commerce Commission, by mailing by regular mail a copy each to Robert W. Ginnane, Esq., its General Counsel, and Charlie H. Johns, Esq., Its Associate General Counsel, both at the Interstate Commerce Commission, Washington 25, D. C.

3. On Appellees Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, by mailing by regular mail copies thereof to their attorney, James D. St. Clair, Esq., 60 State Street, Boston 9, Massachusetts, and, by mailing by air mail, copies to each of their attorneys, R. Wray Henriott, Esq., and Joseph L. Lenihan, Esq., both at 908 West Broadway, Louisville 1, Kentucky.

Dated at Philadelphia, Pennsylvania, this 5th day of July, 1962.

JOSEPH F. ESHELMAN,
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APPENDIX A.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Civil Action No. 60-475-J.

BOSTON AND MAINE RAILROAD ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA ET AL.,
Defendants.

Before HARTIGAN, *Circuit Judge*, and FORD and JULIAN, *District Judges.*

OPINION.

February 8, 1962.

JULIAN, *D. J.*

This action is brought, and the jurisdiction of this Court is invoked, under 28 U. S. C. §§ 1336, 1398, 2284, and 2321-2325, to enjoin, set aside, annul, and suspend the order of the Interstate Commerce Commission of January 28, 1960, entered in Docket No. 32055, *Louisville & Nashville Railroad Co. et al. v. Akron, Canton & Youngstown Railroad Co. et al.*, 309 I. C. C. 491.

The plaintiffs are the Boston and Maine Railroad and forty-six other railroads,[1] and the New York Central Railroad Company (N. Y. C.), the intervening plaintiff.

The United States of America is made defendant under the authority of 28 U. S. C. § 2322. The Interstate Com-

1. These are listed in Appendix A of the amended complaint.

merce Commission, Louisville and Nashville Railroad Company (L & N), and Atlantic Coast Line Railroad Company (Coast Line) are intervening defendants.

The plaintiff and defendant railroads are common carriers of property and are subject to Part I of the Interstate Commerce Act (49 U. S. C., chapter 1).

The Commission's order of January 28, 1960, in Docket No. 32055, that is here under attack by the plaintiffs, requires L & N and Coast Line, the complainants before the Commission, and all the northern railroads, including the plaintiffs, defendants in the proceeding, to establish and apply divisions[2] of joint all-rail class and commodity rates (except those on coal and on coke made from coal)[3] between the points named in the complaint[4] therein and points in official territory on the same basis of divisions as was

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2. A division may be defined as that portion of revenue which each railroad or group of railroads (e.g., southern or northern railroads) participating in a joint rate receives for its sevices in transporting freight.

3. Coal, and coke made from coal, were excepted by common consent from this and prior investigations.

4. Paragraph II of the complaint in Docket No. 32055:

"(1) Between Louisville, Ky., Evansville, Ind., Henderson, Ky., Paducah, Ky., and Cincinnati, Ohio (including Covington and Newport, Ky.), on the one hand, and points on northern and eastern lines, as more fully described in Official-Southern Divisions, 287 I. C. C. 497, 498, and Class Rate Investigation, 1939, 262 I. C. C. 447, 457, on the other hand, over routes in part through southern territory.

"(2) Between points on the Atlantic Coast Line Railroad in Official territory in Virginia between Richmond and Petersburg, inclusive; between Norfolk and Suffolk, inclusive; between Bruce and Marford, inclusive, and Jarratt, on the one hand, and, on the other hand, points on northern and eastern lines, as described in Paragraph II(1) herein."

The complaint in 32055 alleges (paragraph IV) "that the divisions of the involved rates are, and for a long time have been a source of dissatisfaction, trouble, and dispute between complainants and defendants." The defendants therein admit in their answers "that during the last several years there have been discussions without result between representatives of the complainants and the defendants relating to the divisions here involved."

established by the Commission in its Docket No. 29885, *Official-Southern Divisions*, 287 I. C. C. 497, and 289 I. C. C. 4.

For railroad freight rate purposes the United States is divided into "territories." The two territories involved in this case are "eastern" or "official" territory, and "southern" territory. They were defined by the Commission in its report in *Class Rate Investigation, 1939*, 262 I. C. C. 447, 457.[5]

The plaintiffs are northern railroads. The defendants, L & N and Coast Line, are southern railroads.

The present dispute had its origin in the order entered in 1953 by the Commission in Docket No. 29885. In that proceeding, after a general investigation of primary divisions on most of the official-southern interterritorial traffic, the Commission found that "the present primary divisions of joint all-rail class and commodity rates (except those on coal and coke made from coal) between official and southern territories are unjust, unreasonable, and inequitable" and prescribed a new divisional basis on interterritorial traffic between the two territories. All the northern and southern railroads were parties to the proceedings in Docket No. 29885. Thereafter a disagreement arose between the northern and southern lines as to whether the order applied to

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5. Official territory lies generally north of the following line: The Ohio River from its mouth, including south-bank river crossing points on official territory traffic to Cincinnati, Ohio, thence east on the line of the Chesapeake & Ohio Railway to Kenova, W. Va., thence on the main line of the Norfolk and Western Railway to its crossing with the line of the Virginian Railway * west of Roanoke, Va., thence on the Virginian Railway to Suffolk, Va., thence on the main line of the Norfolk and Western to Norfolk, Va., including also all lines of the Chesapeake & Ohio in Kentucky and all lines of the Norfolk & Western except those extending south from Roanoke, Va., to Winston-Salem, N. C., and from Brookneal, Va., to Durham, N. C. Southern territory lies south of official territory and east of the Mississippi River but includes north-bank Ohio River crossings, such as Cincinnati, on southern territory traffic.

* The Virginian Railway Company has since been merged with Norfolk & Western.

the rates on traffic moving to and from the border points.[6] The northern lines claimed that it applied on such traffic moving between the border points and the South, and the southern lines asserted that it applied on such traffic moving between the border points and the North. In its supplemental report of March 5, 1956, 298 I. C. C. 83, the Commission interpreted its decision of 1953 as requiring the use of the 29885 basis of divisions on border-point traffic to and from the South but not on similar movements to and from the North, and gave the following reasons (page 84):

> "The instant proceeding [Docket No. 29885] was instituted for the purpose of reviewing the divisions prescribed in No. 24160, and it was generally understood by the parties that the two proceedings were identical in scope except that divisions of lumber rates omitted from the former proceeding were included in this one. Up to the present time there has been no suggestion that divisions of intraterritorial rates within official territory were in any way involved in this proceeding.
>
> "The southern lines' position is that if intraterritorial traffic moving between the border points described and the South is within the scope of the Commission's order in docket No. 29885, then such border point traffic moving to and from points in the north is likewise within the scope of those orders.' The position is untenable

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6. Border points are generally those points on the dividing line between official and southern territory which for rate-making and rate-division purposes are deemed to be in official territory on traffic to and from the North, and in southern territory on traffic to and from the South. The border points involved here are the following (see also footnote 4 above):

L & N	*Coast Line*
Louisville, Ky.	Richmond to Petersburg, Va., inclusive
Evansville, Ind.	
Henderson, Ky.	Norfolk to Suffolk, Va., inclusive
Paducah, Ky.	
Cincinnati, Ohio, including Covington and Newport, Ky.	Bruce to Marford, Va., inclusive
	Jarratt, Va.

for the reason that the divisions of the southern intraterritorial rates were before us to the extent before indicated, while those of the intraterritorial rates in official territory were not.

"In the petition of the northern lines they point out that the southern lines have refused to join in establishing the prescribed basis of divisions to rates between Cincinnati, Ohio, for example, as well as certain other border points, and southern territory when the northern lines participate in the movement by way of Louisville, Ky. In our opinion these divisions are subject to the order in this proceeding, as they were also to that in No. 24160. . . ."

The result was that on traffic moving between border points and points in southern territory over an official territory line the 29885 divisions [7] applied, whereas on similar traffic moving between border points and points in official territory over a southern line the divisions were made on a mileage prorate basis [8] which gave southern carriers smaller divisions for comparable distances than were received by northern carriers.

Thereupon, three of the southern carriers, namely, L. & N; Coast Line, and the Nashville, Chattanooga & St.

7. The No. 29885 division of rates is based upon prorating factors consisting of a scale of integers arranged by distances designed to reflect numerically the relative value of the transportation service rendered by the participating railroads to and beyond the dividing point. The integers are used to construct percents to be employed in dividing joint rates. The divisions prescribed by the Commission in No. 29885 were established in that manner. An integer of 12 is assigned for each 50 miles or fraction of 50 miles of line-haul service, and an integer of 53, equivalent to 221 miles, is assigned for terminal service at the point of origin, destination or interchange. Terminal service customarily consists of the switching of cars in the terminal area.

8. Mileage prorate is a system of dividing rates whereby each railroad participating in a joint rate receives a share determined by the ratio of its miles of haul to the total miles of the haul from point of origin to point of destination.

Louis Railway Company,[9] on September 4, 1956, commenced these proceedings (No. 32055) by filing a complaint with the Commission in which they sought the application of the 29885 basis of divisions to their border-point traffic moving to and from the North.

In view of the plaintiffs' claim that they were not accorded a full hearing by the Commission, the proceedings before that body will be described in greater detail than would otherwise be necessary.

The Commission assigned the complaint for hearing before one of its examiners. Hearings began in February, 1957, and were concluded in February, 1958. The plaintiffs were accorded a full opportunity to present their defense by oral and documentary evidence, to submit rebuttal evidence, and to cross-examine witnesses.[10] The evidence received at the hearings is contained in 823 pages of transcript and 131 exhibits, many of them of great length, consisting of massive tabulations of statistics relating to movements of traffic, costs, revenues, and divisions of joint rates both on the present and 29885 bases. The examiner received briefs from the parties in April, 1958, and filed his proposed report in January, 1959. The report was favorable to L & N and Coast Line.

In March, 1959, the northern railroads, including the plaintiffs, filed exceptions to the proposed report. The brief containing the exceptions consisted of 132 printed pages and set forth, with detailed supporting arguments and citation of authorities, two general exceptions with subdivisions and 62 specific exceptions. At the same time supplemental exceptions were filed with the Commission by the New York

9. The Nashville, Chattanooga & St. Louis Ry. Co. was merged with the L & N during the proceedings before the Commission.

10. The Administration Procedure Act, 5 U. S. C. 1006(c) provides:

> ". . . Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . ."

Central (34 pages) and the Detroit, Toledo & Ironton Railroad Co. (31 pages). The briefs filed by these two plaintiffs also contained the arguments in support of their exceptions.

In their principal exceptions-brief the plaintiffs requested "the privilege of oral argument."

In April, 1959, L & N and Coast Line filed a lengthy brief (132 printed pages) replying in detail to the plaintiffs' contentions.

On June 1, 1959, the Commission denied the plaintiffs' request for oral argument, "it appearing," said the Commission, "that the matters involved are sufficiently presented in the record and that oral argument in addition thereto is not necessary."

On June 20, 1959, the Commission, in response to a petition of the northern lines, reopened Docket No. 29885.

On September 28, 1959, the plaintiffs filed an 18-page petition for consolidation of the proceedings in Docket No. 32055 (the instant case) with Docket No. 29885 and for oral argument. Again, this petition contained extended arguments. L & N and Coast Line filed a reply in opposition. The Commission denied the plaintiffs' petition on November 23, 1959.

The Commission filed its report and entered the order now under attack on January 28, 1960. The report is found in 309 I. C. C. 491.

On March 7, 1960, the northern railroads filed a 52-page "general petition" to reopen the proceedings for oral argument and reconsideration. On the same date the Detroit, Toledo & Ironton Railroad Co. (one of the plaintiffs) filed a 17-page supplemental petition for modification of the report, and the N. Y. C. (also a plaintiff) filed a 24-page supplemental petition for reconsideration and oral argument. There was a 29-page reply to these petitions by L & N and Coast Line on March 28, 1960.

By order dated May 6, 1960, the Commission denied the petitions for reconsideration.

The Commission's order now under review became effective on July 18, 1960.[11]

The plaintiffs attack the validity of the order on these principal grounds:

1) The order was not made "after a full hearing" as required by the statute in that the Commission refused to hear oral argument.

2) The Commission failed to make the finding as required by statute that the present divisions of joint rates are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto.

3) The Commission failed to prescribe the just, reasonable, and equitable divisions "to be received by the several carriers" as required by statute.

4) The Commission failed to give "due consideration" to the statutory elements that go to relative service costs.

5) The Commission, contrary to statutory and constitutional requirements, based its order not on the record in the proceedings before it, but upon its earlier conclusions in No. 29885.

It is argued by the plaintiffs that the order should be annulled because it was not made "after a full hearing" as required by the statute and the Constitution in that the Commission refused to hear *oral* argument.[12]

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11. On July 15, 1960, an order was entered restraining the enforcement of the Commission's order until further order of this Court.

12. In their brief (p. 50) the plaintiffs state their position as follows:

"The plaintiffs do not contend that, in the absence of any statutory requirement, rule, or fixed practice, the granting of oral argument is a constitutional prerequisite to the validity of an otherwise unobjectionable hearing. They do contend that the arbitrary element inherent in a sudden and previously un-

There is nothing in the Interstate Commerce Act, the Administrative Procedure Act, the Commission's General Rules of Practice, or in Article V of the Constitution of the United States which entitles the plaintiffs to oral argument in addition to written argument. Section 15(6) of the Interstate Commerce Act (49 U. S. C. 15(6) states only that the Commission "after a full hearing upon complaint" may prescribe just, reasonable and equitable divisions. In *The New England Divisions Case*, 1923, 261 U. S. 184, 200, Mr. Justice Brandeis defined a full hearing as

> ". . . one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

In *Morgan v. United States*, 1936, 298 U. S. 468, it was stated, at page 481:

> "Argument may be oral or written. The requirements are not technical."

See also *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 1938, 304 U. S. 333, 350-351; *Federal Communications Commission v. WJR*, 1949, 337 U. S. 265, 267; *American Broadcasting Co., Inc. v. Federal Communications Commission*, D. C. Cir., 1949, 179 F. 2d 437, 442; and *National Labor Relations Board v. Clausen*, 3 Cir., 1951, 188 F. 2d 439, 444.

On the subject of oral argument, the Commission's General Rules of Practice (49 C. F. R.), established by the Commission pursuant to 49 U. S. C. 17(3), read as follows (section 1.98):

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announced reversal of a settled administrative course of conducting hearings vitiates the administrative action even if the aspect of the hearing involved were one which the administrative agency was not bound by Constitution or statute to observe in the first instance."

"*Oral argument before Commission*—

"(a) *Request; how made.* If no officer's report is to be served, request for oral argument before the Commission must be made at hearing or by letter (original only need be filed with the Commission) within 10 days after the hearing. If an officer's report is to be served, the request for oral argument must be included as part of the exceptions brief or reply thereto.

"(b) *Request for time allotment.* If the petition is granted a notice will be served by the Commission upon the parties setting the date for the oral argument. At least 10 days before that date any party desiring to participate in the oral argument must make request by letter (original only need be filed with the Commission) for an allotment of time. Only those making request in this manner will be permitted to participate."

The Commission has construed this rule to mean that the "granting of oral argument in proceedings such as this is discretionary with the Commission." *C. B. Fleet Co., Inc. v. Aberdeen & R. R. Co.*, 1952, 287 I. C. C. 89.

A reading of the exhaustive briefs filed by the plaintiffs with the Commission before the order was entered clearly discloses that the plaintiffs fully exploited the ample opportunities granted them by the Commission to present, in writing, all their arguments in support of their own views and in opposition to the claims of L & N and Coast Line.

In reply to a question from the Court, counsel for the plaintiffs stated that it was doubtful that anything would have been said orally that was not stated to the Commission in writing (Transcript of hearing, p. 43).

We are of the opinion that in these circumstances the granting of an opportunity for oral argument in addition

to full written argument was a matter within the sound discretion of the Commission. We find no merit in the plaintiffs' contention that the denial of their request for oral argument constituted an arbitrary reversal of the Commission's alleged "settled administrative course of conducting hearings" which rendered the Commission's order invalid.

We proceed to a review of the Commission's findings of fact and ultimate conclusions. The applicable standards of judicial review are found in the Administrative Procedure Act, 5 U. S. C. 1009(e),[13] which provides, to the extent here pertinent, that the reviewing court shall

> "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case . . . reviewed on the record of an agency hearing provided by statute. . . . In making the foregoing determination the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The Supreme Court in *Universal Camera Corp. v. National Labor Relations Board*, 1951, 340 U. S. 474, has interpreted section 1009(e) to require affirmance of the findings of an administrative agency if, taking the record as a whole, they are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might

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13. The Attorney General's Manual on the Administrative Procedure Act, 1947, states, at pp. 93 and 108:

> "The provisions of Section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions."
>
> * * * *
>
> "[Sec. 10(e)] restates the present law as to scope of judicial review."

accept as adequate to support a conclusion." It has further been held that the Administrative Procedure Act has not altered the rule of administrative finality. *Baltimore Transfer Co. v. I. C. C.*, 1953, D. C. Md., 114 F. Supp. 558, 564, affirmed in 346 U. S. 890 (1953). The courts will not examine the findings of fact further than to determine whether there was substantial evidence to sustain them. *Interstate Commerce Commission v. Union Pacific R. R.*, 1912, 222 U. S. 541, 547. If the evidence was substantial, then the Commission alone is authorized to decide upon its weight or the significance of the facts. *Baltimore & Ohio R. Co. v. United States*, 1936, 298 U. S. 349, 358. The Commission's order is the product of expert judgment which carries a presumption of validity. "And he who would upset the . . . order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *I. C. C. v. Jersey City*, 1944, 322 U. S. 503, 512. The administrative body was created for the purpose of using its judgment and its knowledge. *Labor Board v. Seven Up Co.*, 1953, 344 U. S. 344, 348. While presumed valid, however, the order may be annulled if shown to rest on a misconstruction of the Act or upon inadequate or unsupported findings of fact. *Baltimore & Ohio R. Co.* case, supra, at page 358. The Commission's "expertise is not sufficient by itself. Findings supported by substantial evidence are required." *I. C. C. v. J-T Transport Co.*, 368 U. S. 81, (Dec. 4, 1961). The function of the court is to review the administrative action, not to determine whether the "court on the evidence would have reached the same result as did the Commission." *Old Colony Furniture Co. v. United States*, 1951, D. C. Mass., 95 F. Supp. 507, 509. The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body. *Mississippi Valley Barge Line Co. v. United States*, 1934, 292 U. S. 282, 286.

The Commission's failure in many instances to draw a clear line of demarcation between findings of fact [14] and summaries, analyses and discussion of the evidence has contributed heavily to the difficulty of revjewing this case. It is to be noted that the Commission "is required to make not only findings that support its decision . . . but also findings that are intelligible and complete." Concurring Opinion of Mr. Justice Douglas in *United States v. Drum*, — U. S. —, January 15, 1962.

Despite its deficiencies,[15] we believe that the report contains sufficient findings of fact to enable the Court to perform the task assigned to it on review.

The Commission's findings may be summarized as follows:

> On interterritorial traffic between official and southern territories the joint rates are divided on the 29885 basis of divisions (see footnote 7, supra). On traffic moving between border points and the South over an official-territory line, the 29885 basis also applies, whereas on similar traffic moving between border points and the North over a southern line, the divisions are on a mileage prorate basis (see footnote 8, supra). As

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14. Section 8(b) of the Administrative Procedure Act, 5 U. S. C. 1007(b) provides:

"... All decisions ... shall include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

15. Transcript of hearing, p. 49:

"Mr. J. Raymond Clark [counsel for the plaintiffs] ... I would like to make it plain at the outset, however, that plaintiffs do not here ask this Court to undertake to resolve disputed issues of fact. We are prepared to demonstrate that indeed the Commission's report is deficient in many respects with respect to findings of fact. Substantial errors and omissions will necessarily appear in the course of my very brief description of the record. Nevertheless, we do not press our objections to the Commission's errors and omissions with respect to findings of fact. We are content to ask the Court to examine the report of the Commission, to take it at its face value, if you will ..."

a result, the southern carriers receive smaller divisions for comparable distances than the northern carriers.

The division of joint rates on a mileage prorate basis is unreasonable in instances where carriers perform a short haul as compared with the haul of the other participating carriers.[16]

The L & N's average haul is 124 miles and that of the plaintiffs is 472 miles. On the Coast Line traffic the distances vary from 8 to 53 miles as compared with an average of 439 miles for the northern railroads. Thus the line hauls of the L & N and Coast Line are relatively short when compared with those of plaintiffs, and the present divisional basis gives too little consideration to the fact that freight rates cover terminal and interchange services as well as line-haul operations.

Approximately 93 per cent of the L & N's traffic[17] involved in this proceeding originates or terminates

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16. The Commission has found that the division of revenue on mileage prorate is an unreasonable basis for dividing joint rates in instances where carriers perform a short haul as compared with the haul of other participating carriers because it gives too little consideration to the fact that freight rates must cover terminal and interchange services as well as line-haul operations. Thus, in *Southwestern-Official Divisions*, 234 I. C. C. 135 (decided in 1939) the Commission stated, at page 140:

> "... we are of the view that a mileage prorate does not afford fair divisions where there are wide differences in the lengths of haul in respective territories."

And at page 161:

> "... but since there was a difference of about 250 miles in the average hauls in the two territories a mileage prorate is not a proper criterion."

In the oral argument before the Court the plaintiffs conceded that in a short haul terminal expense is relatively heavy, while in a long haul terminal expense is relatively less burdensome. (Transcript of hearing, p. 8.)

17. The bulk of the traffic with which this case is concerned falls within the manufactures and miscellaneous group and has a high rate level as compared with coal and other commodities of lower grade.

at Louisville and about 85 per cent of such traffic moves to or from Louisville through Cincinnati. L & N's costs at these two terminals, which are situated at either end of a comparatively short haul of 110 miles, are higher than those at its other terminals. The operating cost per car (loaded or empty) at Louisville is $4.46, and at Cincinnati $2.87. At L & N's four other major terminals the costs per car range from $1.23 to $2.64, the average for the six terminals being $2.52. Because of the high cost of switching and interchanging of cars and the cost of using and maintaining bridges, the Louisville terminal is L & N's most expensive to operate, and Cincinnati its second most expensive.

L & N's carload traffic here involved represented about 7.6 per cent of its total manufactures and miscellaneous traffic for 1955 but produced only 3.6 per cent of its total revenue from that source. Moreover, although it represented 2.3 per cent of all carload traffic handled by the L & N, it produced only 1.5 per cent of L & N's total freight revenues. This was due to L & N's failure to obtain the divisions of revenue on the 29885 basis.

As compared with the total carload traffic moved by Coast Line in 1955, the carloads here involved constituted 0.4 per cent of its total traffic but produced only 0.18 per cent of the total freight revenue, although the average rate on the border point traffic is higher than the average rate for all its freight.

During the period from 1946 through 1955 L & N and Coast Line expended very large sums for modern equipment and for other improvements on their lines which contributed to more efficient operations. By these and other means described on pages 499 and 501 of the Commission's report, L & N and Coast Line have

in recent years improved their operations in relation to those of the plaintiffs, despite the fact that the principal plaintiffs enjoy a greater density of traffic on their lines which affords them greater opportunities for handling heavier trains with resulting economies.

The Commission found that the position of the L & N and Coast Line on traffic from border points to the North is not materially different from that of the plaintiffs on traffic from border points to the South when the 29885 basis was established with reference to the latter traffic in the *Official-Southern Divisions Case*, supra.

The 29885 basis would give L & N and Coast Line no greater revenue than the plaintiffs now receive on border-point traffic to the South moving under similar circumstances.[18]

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18. There is abundant evidence in the record to sustain this finding. One example is a typical movement of a carload shipment of tractors weighing 40,269 pounds from Louisville, Ky., to New York, N. Y., via L & N to Cincinnati, 110 miles (short line and actual car miles) and from Cincinnati to New York via B & O, a northern carrier, 724 miles, short line (756 actual car miles). The total revenue was $293.96. Under present divisions L & N received $42.16 and B & O $251.80. On a like carload shipment from Cincinnati, Ohio, to New Orleans, La., via B & O to Louisville, Ky., 110 miles, short line (129 actual car miles), and from Louisville to New Orleans via L & N 746 miles, short line (807 actual car miles), out of a total revenue of $293.96 B & O would receive under the applicable 29885 basis of divisions the amount of $82.31 as its share of the joint rate, and L & N's share would be $211.65. The transportation service performed by L & N in the shipment to New York is substantially the same as that rendered by B & O in the shipment to New Orleans, yet L & N under present applicable divisions receives only $42.16, while B & O receives $82.31 on the 29885 basis. The Commission's order would give L & N the same share of the joint rate that is now being given to B & O for substantially the same services. (See Exhibit 2, page 64, and Exhibit 3, page 8.)

A similar example is given in the Commission's report, 309 I. C. C. 491, 494. There the northern carrier is the New York Central.

From a station on the L & N in southern territory only 21 miles west of Louisville, the revenue derived from a carload of furniture on an *interterritorial* shipment would be $73.80 on the applicable 29885 basis, which is the same as the northern lines now receive on their border point movements to the South. The 29885 basis is also presently applied to an interterritorial shipment from a station five miles east of Louisville through which Louisville traffic must pass on its way to Cincinnati. (See Commission's report, page 494.)

The Coast Line stations between Petersburg and Jarratt, both interchange points, are now subject to the 29885 basis, although Jarratt and Petersburg themselves are not. (See Commission's report, page 496.)

Still another example of inequality in divisions is given in the Commission's report at page 497. Under present divisions Coast Line receives 22 per cent of the rate applying between Jarratt and New York after first deducting the New York terminal charge which accrues to the northern lines. From Emporia, Va., a point in southern territory, immediately south of Jarratt on the Coast Line and only nine miles more distant from Richmond, the gateway, the Coast Line receives 36 per cent under the applicable 29885 basis. The Commission finds that this inequality exists also in connection with the other border points.

The Coast Line stations occupy a geographic position in official territory similar to that of the Norfolk & Western stations south of the border in Virginia and North Carolina, and also similar to certain of the Chesapeake & Ohio stations in southern territory which now enjoy the 29885 basis of divisions.

The Commission found that the 29885 basis of divisions accords appropriate recognition to the relatively short hauls of the L & N and Coast Line, and to

the terminal costs which, especially on the L & N at Louisville, are relatively high.

The Commission considered the average rates of return for the eastern carriers and for L & N and Coast Line. It concluded that since the issue in this case concerns only a small segment of the carriers' traffic over a fractional part of their lines, comparisons of rates of return were not controlling.[19]

All the foregoing findings of the Commission are supported by substantial evidence.

The plaintiffs assert that in prescribing 29885 divisions the Commission failed to make the finding, prerequisite under section 15(6), that the existing divisions are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers that are parties thereto. In addition to this assertion N. Y. C. contends that the Commission failed to prescribe the just, reasonable and

19. Based on a study of the traffic movements between the border stations of the L & N and official territory, it was estimated that the L & N's share of the annual revenue under the 29885 basis would be increased by approximately $1,250,000 on carload traffic plus an eventual $50,000 to $60,000 per year on less-than-carload traffic. On the basis of a similar traffic study, it was estimated that Coast Line's revenues would be increased annually by approximately $140,000. The combined operations of these two roads represented about 30 per cent of the total rail miles operated by the Class I railroads in southern territory during the period 1950 through 1955. During these same years their share of the total revenues of the railroads in southern territory dropped from about 29 per cent in 1951 to 26 per cent in 1955. There was evidence that the increase of $1,300,000 per year in revenue estimated to accrue to the L & N under the prescribed 29885 divisions amounts to about 18/1000 of 1% of the total revenue of the northern railroads. The estimated increase of $140,000 per year to the Coast Line amounts to 2/1000 of 1% of the northern railroads' total revenues. There was also evidence that the estimated increased revenue of the L & N would have reduced the rate of return for the northern railroads in 1955 from 4.1896 per cent to 4.1842 per cent, while the estimated increases for the L & N and Coast Line would, together, have raised the rate of return for both railroads from 4.0733 per cent to 4.1300 per cent.

equitable divisions "to be received by the several carriers" as required by section 15(6).[20]

In the *Baltimore & Ohio Railroad* case, supra, the Supreme Court stated, at page 356:

> "The prescribing of divisions is a legislative function. Exertion of that power by the Commission is conditioned upon its finding after a full hearing that the divisions then in force do not, or in the future will not, comply with the specified standards."

The Commission met this requirement by making the following ultimate findings (page 511 of its report):

> "We find that the present primary divisions of joint all-rail class and commodity rates (except those on coal, and on coke made from coal) between the points named in the complaint and official territory points are and for the future will be unjust, unreasonable, and inequitable; and that just, reasonable, and equitable primary divisions of the rates will be divisions determined on the 29885 basis . . . ."

Since the only divisions involved in the proceedings were primary divisions between L & N and Coast Line on the one hand, and the plaintiffs on the other, the findings could be given no other reasonable meaning than that the present divisions of the joint rates applicable to the traffic here involved are and for the future will be unjust, unreasonable, and inequitable *as between the carriers parties thereto*, namely, between L & N or Coast Line on the one

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20. 49 U. S. C. § 15(6) provides in part as follows:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates . . . applicable to the transportation of . . . property, are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers parties thereto . . . the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers . . ."

hand, and the several plaintiffs on the other. It is also clear from the quoted findings that the prescribed 29885 divisions are the primary divisions of the joint rates to be received by the L & N or Coast Line and by the northern carrier or carriers participating in the transportation of the same traffic to or from points in official territory.

The plaintiffs assert that in making its order the Commission failed to comply with the requirements of section 15(6) in that it did not give "due consideration" to the statutory elements which go to relative service costs. They further contend that relative costs furnish the *primary* criterion of fair divisions.

They argue that the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation and whether any particular participating carrier is an originating, intermediate, or delivering line, to all of which the statute requires "due consideration" to be given, are matters going to cost of service. The statute,[21] however, does not establish cost of service or any other factor as the primary criterion of fair divisions. "Due consideration" is not the equivalent of "primary consideration." The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance

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21. 49 U. S. C. § 5(6) provides in part as follows:

"In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitled one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

of the various factors in any given case is peculiarly the function of the Commission.

After making an analysis of the evidence of costs introduced by the parties, the Commission found that "the only comparable cost data for the complainants [L & N and Coast Line] and the defendants [the plaintiffs here] are on the basis of territorial or systemwide averages, which are not determinative of the costs of these particular movements." This finding is supported by substantial evidence.

An examination of the massive record of the proceedings before the Commission discloses that an abundance of evidence relating to costs was introduced at the hearings before the examiner. A study of the Commission's report shows clearly that the Commission gave careful consideration to this evidence.

A just share is the amount properly apportioned out of the joint rate. That amount is to be determined not by an agreement of the parties or by mileage, but is to be fixed at what the Commission finds to be just, reasonable, and equitable, and the cost of the service is one of the elements to be considered. See *The New England Divisions Case*, 1923, 261 U. S. 184, 195. "There is no single test by which 'just', 'reasonable', or 'equitable' divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act." *B. & O. R. Co. v. United States*, 1936, 298 U. S. 349, 359.

The question of divisions involves the making of practical judgments and cannot be solved "as though it were a mathemathical problem to which there could only be one correct answer." *Interstate Commerce Commission v. Union Pacific R. R.*, 1912, 222 U. S. 541, 550.

"Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential." *Alabama Great Southern Railroad Co. v. United States*, 1951, 340 U. S. 216, 223. In the footnote on page 223 of the case last cited, the Court states: "Both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making."

In the supplemental exceptions, dated March 9, 1959, filed by N. Y. C. to the proposed report of the examiner, it is stated (at page 24) that L & N's restatement of the northern railroads' cost study "destroyed any possible comparison as adjusting the L & N costs without making similar adjustments in the N. Y. C. costs." N. Y. C. went on to say that "it would be unrealistic to expect the New York Central to study the movements at the 130 points involved" on its railroad. N. Y. C. argues that since the burden of proving the unreasonableness of existing divisions was upon the complainant L & N, it was incumbent upon the latter carrier to produce evidence of the relative costs of handling the traffic in question. L & N, however, did introduce in evidence its own actual costs in place of average costs. The costs put in evidence by N. Y. C. were unadjusted average costs for the northern railroads which did not reflect the actual costs. The Commission found that this evidence was not helpful in determining the costs of the particular traffic involved in this case. N. Y. C. now takes the position that the burden of adjusting the average costs presented in evidence by the *plaintiffs* was on the L & N, even though the data necessary to make these adjustments were not available to the L & N and could only be produced by the plaintiffs themselves. We think this position is untenable.

The plaintiffs allege in their amended complaint (Par. VII), and the defendants United States and Interstate Commerce Commission admit in their answer, that in pre-

scribing divisions in No. 29885 the Commission had noted northern lines' evidence of relatively higher costs for the North than for the South in the years 1946 and 1948, but had not accepted this showing, because it considered it to be the safest assumption for the future that neither contesting group would have an appreciably lower basis of costs than the other; and that contrary to this assumption, the record in the instant proceedings contains uncontroverted cost comparisons both of the northern lines' and the Commission's Cost Section computation, which establish that the costs of the northern group have continued to increase relative to those of the southern group and now substantially exceed them. It is clear from the report, however, that in the Commission's judgment this fact was not of controlling significance in view of its finding that territorial or systemwide averages are not determinative of the costs of the particular movements here involved.

It is contended by the plaintiffs that the Commission did not base its order upon the record before it but upon its earlier conclusions in No. 29885 without evidence to sustain its assumption of similar circumstances.

The Commission found that the record in No. 29885 "differed little in respect of border-point traffic from that before us here." This finding is supported by substantial evidence.

It was perfectly proper for the Commission to compare the records in the two dockets. All the parties before the Commission in this case were also parties before the Commission in Docket No. 29885. At the hearing before the examiner the plaintiffs themselves introduced in evidence (Exhibit 35) a documentary history of the divisions of border-point rates prescribed in Docket Nos. 24160 *and* 29885.

Evidence was received (Exhibit 3) of typical illustrations showing (1) present and proposed (29885) divisions and revenue on traffic between border points and official territory; (2) present (29885) divisions on traffic between

border points and southern territory assuming same movements as in (1) and at same rate for similar hauls; and (3) present (29885) divisions and revenue on interterritorial traffic between official and southern territories, also assuming same movements as in (1) and at the same rate for similar hauls.

Evidence was also received (Exhibit 4) of present and proposed divisions and revenue on traffic between border points and official territory on the one hand, and present divisions and revenue on traffic to or from southern points intermediate to and (or) beyond the border point assuming same car as above moved at same rate for similar hauls.

The Commission's finding that border-point traffic to the North moves under similar circumstances as border-point traffic to the South is supported by substantial evidence. Joint rates on the latter traffic are being divided on the validly established 29885 basis of divisions.

A validly established and currently applied basis of divisions of revenue derived from similar traffic moving in the same or adjacent territory under similar circumstances may properly be considered as a criterion, though not necessarily a controlling one, of the reasonableness of prescribing the same basis of divisions of the revenue here in issue. See *Youngstown Sheet & Tube Co. v. United States*, 1934, 295 U. S. 476, 480; see also *United States v. Northern Pacific Ry. Co.*, 1933, 288 U. S. 490, 500.

The plaintiffs point out that Docket No. 29885 has been reopened by the Commission and that the basis of divisions established in that case is being re-examined. They argue that this fact together with the evidence of higher current costs of operation for northern railroads introduced in the case now under review renders unreasonable the application of that basis to this case. The validity of that argument is necessarily based on the assumption that in the reopened case the Commission will not only find higher group costs in the north but will also give controlling weight to that finding. The plaintiffs are in effect asking that we

annul the order on the assumption that the Commission will decide the reopened proceedings in favor of the plaintiffs, that the decision will be made retroactive, and that if challenged in the courts it would be ultimately upheld. We cannot reasonably make these assumptions. We cannot predict what the final decision in the reopened case will be.

A suspension of the operation of the order until the reopened proceedings have been concluded is open to the added objection that it would be tantamount to a reversal by this Court of the Commission's refusal to consolidate this proceeding with the reopened Docket No. 29885. That action was clearly within the scope of the Commission's discretionary power.

The New York Central claims that in prescribing the 29885 basis of divisions for the instant traffic the Commission ignored the typical evidence rule. In *The New England Divisions Case*, 1923, 261 U. S. 184, the Court stated (page 199):

> "Congress may, consistently with the due process clause, create rebuttable presumptions . . . and shift the burden of proof. . . . It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining divisions. For only in that way could the task be performed."

The Court restated the rule in *Beaumont, S. L. & W. Ry. v. United States*, 1930, 282 U. S. 74, at pages 82-83:

> "The Commission may not change an existing division unless it finds that division unjust or unreasonable. . . . But it need not under all circumstances take specific evidence as to each rate of every carrier. When

considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories the Commission may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate. That is to say, such typical evidence may sufficiently disclose the facts necessary to enable the Commission duly to consider the divisions of each joint rate to be received by every carrier."

There was evidence, typical in character and sufficient in quantity, of the nature of the traffic and operating conditions, and of the joint rates and bases of divisions, of L & N and Coast Line on the one hand, and of the participating northern railroads as a group on the other, to enable the Commission to prescribe the 29885 basis of divisions without the necessity of requiring specific evidence and separate adjudication in respect to each division of the joint rates between each of the two southern railroads and each plaintiff.

The plaintiffs contend that the Coast Line stations involved in this case are not border points. This contention was considered and rejected by the Commission.[22] The

22. "Stations on the line of the Norfolk & Western extending from the territorial boundary southward to Bristol, Va., are recognized as in official territory, and traffic between them and other points in the South are accorded the 29885 interterritorial divisions. The same is true with respect to Chesapeake & Ohio stations in southern territory. Geographically and for ratemaking purposes, the latter stations occupy the same position in southern territory as the considered Coast Line stations do in official territory. Those two carriers participate in the 29885 basis from stations geographically located with respect to border territory and the gateways generally the same as those on the Coast Line." (Page 503 of the Commission's report.)

"The Coast Line stations occupy a geographic position in official territory similar to that of the Norfolk & Western stations south of

Commission's finding that they are border points is supported by substantial evidence (see Exhibits 19 and 25, and Transcript, pp. 128-129).[23]

The New York Central states that the Commission erred in concluding (page 503 of its report) that the "fact that only two carriers of the few serving the border points are complainants is not a controlling factor." In the absence of any showing of the nature and extent of the interest of the southern carriers not parties to the proceeding, it cannot reasonably be held that the Commission's conclusion

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the border in Virginia and North Carolina, and a[re] similar to certain of the Chesapeake & Ohio stations in southern territory, now enjoying the 29885 divisions." (Page 510 of the Commission's report.)

Both the Norfolk & Western and Chesapeake & Ohio are plaintiffs here.

23. Exhibit 25 shows generally the stations on the Norfolk & Western and the Chesapeake & Ohio south of the line which were considered by the Commission in *Class Rate Investigation, 1939*, 262 I. C. C. 447, as being part of official territory even though geographically they are in the South. The reason for the inclusion of these points south of the border was explained on page 527 of the cited Class Rate Investigation case as follows:

> "Although certain points on the Chesapeake & Ohio Railway in Kentucky, and on the Norfolk & Western Railway in Virginia, are within the boundaries of southern territory, rates between them and official territory are discussed under this title of the report dealing with rates within the latter, because in the eastern revision they were treated with rates in official territory, and they are subject to official classification."

Those points are therefore in official classification territory on traffic moving to or from the North but they are also in southern classification territory on traffic moving to or from the South. They are border points, and on the latter traffic the divisions are based on Docket 29885. The Coast Line stations involved in this proceeding are likewise in official classification territory on traffic to and from the North and in the southern classification territory on traffic to and from the South. They also lie in the area between North and South. The rates of Coast Line on traffic between these border points and the North are all intraterritorial in nature, as are the rates of Norfolk & Western and Chesapeake & Ohio on traffic between their border points referred to above and the South. The Commission properly found that there is no practical difference between the movement of the traffic to or from the North and the movement of the traffic to or from the South.

is erroneous. The failure of such other carriers for undisclosed reasons to join in these proceedings did not preclude L & N and Coast Line from asserting their claim for relief. The joinder of the other southern carriers was not essential. The order entered by the Commission is directed to L & N, Coast Line, and the northern carriers. It does not purport to affect the division of rates between any other southern carrier and the northern railroads. *United States v. Abilene & So. Ry. Co.*, 1924, 265 U. S. 274, 283.

We are persuaded from a careful study of the record that the findings of fact made by the Commission are supported by substantial evidence and that they in turn supply a rational basis for the ultimate findings and for the order. We are further of the opinion that in arriving at its decision the Commission substantially observed the standards prescribed by the Interstate Commerce Act.

The plaintiffs' amended complaint and the complaint of the New York Central, intervening plaintiff, are therefore dismissed.

APPENDIX B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Civil Action No. 60-475-J.

BOSTON AND MAINE RAILROAD ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA ET AL.,
Defendants.

JUDGMENT.

March 13, 1962.

HARTIGAN, *Circuit Judge*, and FORD and JULIAN, *District Judges.*

The above-entitled action to enjoin, set aside, annul and suspend the order of the Interstate Commerce Commission of January 28, 1960, in *Louisville & Nashville Railroad Co. et al. v. Akron, Canton & Youngstown Railroad Co. et al.*, Docket No. 32055, 309 I. C. C. 491, came on for hearing before a three-judge Court, and in accordance with the opinion of the Court dated February 8, 1962, it is hereby

ORDERED that the plaintiffs' amended complaint and the complaint of the New York Central Railroad Company be, and they hereby are, dismissed.

/s/ JOHN P. HARTIGAN,
United States Circuit Judge.

/s/ FRANCIS J. W. FORD,
United States District Judge.

/s/ ANTHONY JULIAN,
United States District Judge.

APPENDIX C.

INTERSTATE COMMERCE COMMISSION.

No. 32055.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

Decided January 28, 1960.

Divisions of joint rail class and commodity rates between official-southern border points and points in official territory, found unjust and unreasonable for the future, but not in the past. Lawful basis of divisions prescribed.

R. W. Henriott and *Richard B. Gwathmey* for complainants.

Andrew C. Armstrong, A. P. Donadio, J. Raymond Clark, Joseph F. Eshelman, J. W. Grady, J. T. Clark, Martin A. Meyer, Jr., R. B. Claytor, Robert H. Pratt, Robert D. Brooks, Kenneth A. Lundmark, John A. Daily, W. T. Pierson, A. Paul Funkhouser, Edward M. Sullivan, and *R. G. Bleakney, Jr., for defendants.*

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the defendants, to which the complainants replied. Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically

discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainants, the Atlantic Coast Line Railroad Company, the Louisville and Nashville Railroad Company, and The Nashville, Chattanooga & St. Louis Railway,[1] the first named hereinafter referred to as the Coast Line and the last two usually as the L. & N. allege by complaint filed on September 4, 1956, that the divisional bases observed in dividing joint freight rates[2] applicable on carload and less-than-carload traffic (except coal, and coke made from coal) moving (1) over the lines of the L. & N. between Evansville, Ind., Henderson, Louisville, and Paducah, Ky., and Cincinnati, Ohio (including Covington and Newport, Ky.), on the one hand, and, on the other, points on the lines of the defendants in official territory,[3] hereinafter sometimes referred to as the North, and (2) over the lines of the Coast Line between stations thereon from Richmond to Petersburg, Va., inclusive, Norfolk to Suffolk, Va., inclusive, Bruce to Marford, Va., inclusive, and Jarratt, Va., on the one hand, and, on the other, points on the defendants' lines as described in (1) above, were and are unlawful in violation of sections 1(4) and 15(6) of the Interstate Commerce Act. We are asked to prescribe lawful divisions for the future, and to require retroactive adjustment of the divisions to the date of the filing of the complaint.

Of the complainants' stations mentioned above, Paducah, Evansville, Louisville, Cincinnati, Richmond, Petersburg, Jarratt, Suffolk, and Norfolk are territorial gateways between official and southern territories.

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1. The Nashville, Chattanooga & St. Louis Railway merged with the Louisville and Nashville Railroad Company on August 30, 1957, as authorized in *Louisville & N. R. Co. Merger*, 295 I. C. C. 457. Reference hereinafter to the L. & N. will also include the stations located on the lines of the Nashville, Chattanooga & St. Louis, unless otherwise indicated.

2. Rates, divisions, and other charges are stated per 100 pounds, except as otherwise noted.

3. Points on lines of the defendants are more fully described in docket No. 29885, *Official-Southern Divisions*, 287 I. C. C. 497, 498, and *Class Rate Investigation, 1939*, 262 I. C. C. 447.

Generally throughout and between official and southern territories, the applicable class rates are based on the docket No. 28300 scale. Within official territory the exceptions rates are on the No. 15879 basis, and in southern territory they are based on the No. 13494 scale, which were the respective class-rate scales in effect prior to the establishment of the No. 28300 basis.

On interterritorial traffic between official and southern territories, the rates are divided on what is known as the No. 29885 division of rates, which is on a graduating mileage-block basis of 50-mile blocks. On traffic moving between border points and the South over an official-territory carrier, the 29885 division applies, whereas on similar traffic moving between border points and the North over a southern line, the divisions are on a mileage prorate basis. As a result, the southern carriers receive smaller divisions for comparable distances than the northern carriers. For example, the defendants divide the revenue on the 29885 basis on traffic originating at Louisville and moved by the Baltimore and Ohio Railroad Company to Cincinnati, thence to a point in the South. This is the basis sought by the complainants on traffic originating at Louisville and moved by the L. & N. to Cincinnati, thence to a point in official territory.

In *Official-Southern Divisions*, 287 I. C. C. 497, decided on January 12, 1953, the 29885 divisional basis was prescribed on interterritorial traffic between these territories. The parties thereto failed to agree in applying that basis on border-point traffic. In a supplemental report, 298 I. C. C. 83, that decision was interpreted as requiring use of the 29885 basis on border-point traffic to and from the South, but not for similar movements to and from the North, for the reason that the evidence failed to deal with interterritorial rates in official territory. The southern carriers therein adduced no evidence in their behalf on border-point traffic, but merely opposed the establishment of 29885 divisions on such traffic. The issue before us here is the rea-

sonableness of the divisions on this border-point traffic to and from points in official territory.

L. & N. traffic and divisions.—The L. & N. made a study covering the months of September 1955 and March 1956, referred to hereinafter as the traffic study, of its traffic moved in various types of cars between the border stations and official territory. Based thereon, it was estimated that L. & N.'s share of the annual revenue under the 29885 basis would be increased by approximately $1,250,000 on carload traffic plus an eventual $50,000 to $60,000 per year on less-than-carload traffic. On the basis of a similar traffic study, the Coast Line estimates that its revenues would be increased annually by approximately $140,000. The combined operations of these two roads represents about 30 percent of the total rail miles operated by the class I railroads in southern territory during the period 1950 through 1955. During these same years their share of the total revenues of the railroads in southern territory dropped from about 29 percent in 1951 to 26 percent in 1955.

The L. & N. handled 5,385 carloads between the border points and official territory during the period of the traffic test, which is the equivalent of 32,310 carloads a year. The great majority of these loads moved between the border points of Louisville and Cincinnati. This traffic is generally in the manfactures and miscellaneous group, normally a profitable type of traffic. The 32,310 carloads represented about 7.6 percent of the L. & N.'s total manufactures and miscellaneous traffic for 1955, but only 3.6 percent of its revenue was derived therefrom. Moreover, in comparison with its total traffic, the 32,310 carloads represent 2.3 percent of all carload traffic handled, but produced only 1.5 percent of the freight revenues. This showing is attributed to its failure to obtain the divisions of revenue here sought.

The 5,385 carloads moved some 2.5 million car-miles north of the interchange points and about 667,000 car-miles south of such points. The respective short-line car-miles were approximately 2,300,000 and 648,000. The total revenue from the 5,385 carloads amounted to about $1,620,000,

of which the L. & N. received $397,000 with the division based on actual miles. Under the sought 29885 divisions, based on short-line miles, it would have received $581,000.

The average revenue from the 5,385 carloads was $300.96 which, for the actual average mileage in the South of 124 miles and in the North of 472 miles, was settled on a basis of $73.89 to the L. & N. and $227.07 to the northern lines. The 29885 divisions based on average short-line distances of 120.5 miles in the South and 428.2 miles in the North would have been $108.05 and $192.91. After deducting the average bridge toll of $15 per car, the L. & N.'s portion of the total revenue was further reduced.

Using the rates on 30 different commodities, the L. & N. compares its revenues under the present basis of divisions on traffic moving from Louisville via Cincinnati to destinations in official territory with the revenue under the 29885 basis from Cincinnati via Louisville to southern destinations for approximately the same distance and at the same rate level. The latter divisions are the same as on interterritorial traffic. The comparisons below are based on an actual movement of a 12,000-pound carload of furniture, and are representative of the border-point traffic here concerned:

Origin and destination	*Route*	*Short miles*	*Actual miles*	*Revenue per car*	
				As settled	*Proposed 29885 basis*
Between border points and official territory					
From Louisville, Ky., to Newburgh, N. Y.	L. & N. to Cincinnati; N. Y. C. beyond	110 732	110 794	$33.44 230.14	$73.80 189.78
	Total			263.58	263.58
Between border points and southern territory					
From Cincinnati, Ohio, to New Orleans, Ky.	B. & O. to Louisville; L. & N. beyond	110 746	129 807	73.80 189.78	
	Total			263.58	

From West Point, Ky., a station on the L. & N. in southern territory, only 21 miles west of Louisville, the revenue derived from a carload of furniture on a interterritorial shipment would be $73.80 on the 29885 basis, which is the same as the northern lines now receive on their border-point movements, as shown in the table. An interterritorial operation from St. Matthews, Ky., 5 miles east of Louisville, and through which Louisville traffic must pass in going to Cincinnati, also receives the higher 29885 division. The shorter the L. & N.'s haul to the border gateway, the greater the spread between the present and sought divisions of rates by reason of the addition under the latter basis of an arbitrary number of miles to the actual distance to take care of the terminal expense. Where the distance north of the gateway is less than that south of the gateway, the L. & N. generally receives a greater amount under the present divisions than it would receive under the proposed basis. On traffic moving from Cincinnati over the line of the Baltimore and Ohio Railroad Company (through official territory) to Louisville, thence the L. & N. to points in Alabama, Louisiana, Mississippi, and Tennessee, prior to the establishment of the 29885 divisions, the northern or official-territory carrier averaged $46.36 per car, as compared with $91.07 under the 29885 basis.

The complainants' present mileage prorate basis results in applying the destination division at intermediate points, despite the shorter distances to such points. For example, the distance from Louisville to Cincinnati over the L. & N. is 110 miles for the short and actual miles. From Cincinnati to Baltimore, the short and actual distance is 560 miles over the Baltimore & Ohio. The latter carrier receives 85 percent, plus the eastern terminal allowance, out of the total revenue. To Stewart, W. Va., 198 short-line miles and 199 actual miles from Cincinnati, and intermediate to Baltimore on the Baltimore & Ohio, the latter carrier receives the same divisions, or 85 percent of the total revenue. From Louisville to Philadelphia, Pa., via Cincinnati

over the lines of the Pennsylvania Railroad Company north of the gateway, the latter carrier for an actual distance of 668 miles gets 86 percent of the revenue, which is blanketed back to Steelton, Pa., for a distance of 107 miles. Apparently, however, when it has the long haul, the L. & N. enjoys the same advantage under mileage prorate divisions.

On all carload traffic, except coal and coke, for 1952 through the first 9 months of 1956, the eastern district (including the Pocahontas region), the southern region, and the L. & N., respectively, had average revenue per car of $122.40, $114.61, and $136.49; and average hauls of 191.1 204.7, and 217.8 miles. Based on our carload waybill analysis from 1948 through 1955 for official and southern intraterritorial traffic, respectively, the average tons per car were 39 and 40.75. However, despite the latter's heavier loading, the average earnings per car-mile were 69.75 and 63.38 cents.

The bulk of the L. & N.'s traffic is to and from Louisville. The number of industries served by it at that point increased from 189 in 1945 to 264 in 1956, 225 of which are located exclusively on the L. & N.

Coast Line traffic and divisions.—The Coast Line interchanges at the Virginia gateways of Richmond, Petersburg, Jarratt, Suffolk, and Norfolk with one or more of the following lines: The Chesapeake and Ohio Railway Company, the Richmond, Fredericksburg and Potomac Railroad Company, the Virginian Railway Company, and the Pennsylvania. As of December 31, 1956, it operated 5,292.4 miles of trackage, with only a small part north of the border between official and southern territories, which in that area consists of the lines of the Virginian and the Norfolk and Western Railway Company from Jarratt to Norfolk. The maximum haul of the Coast Line to a gateway is 53 miles. It serves 99 industries at the border stations under consideration, 11 jointly with other rail carriers.

The Coast Line's traffic consisted of 766 carloads for a 2-month test period in September 1955 and March 1956,

the equivalent of 4,596 carloads per year. As compared with the total carload traffic moved by this complainant in 1955, the 4,596 carloads represent 0.4 percent of the traffic but produced only 0.18 percent of the freight revenue.

The present rates are generally divided on percentages based on mileages to and from points in the eastern portion of official territory, and are arbitrarily made when to and from points in the western part of official territory. For example, between various Coast Line stations in Virginia and trunkline-territory points, the class rates are divided by percentages based on mileage and subject to a minimum for the Coast Line of 20 percent from and to points south of the main line of the New York Central Railroad Company, and 15 percent from and to points north of that line. The class rates to and from New England territory are divided by allowing the Coast Line 20 cents per 100 pounds on first class, with the other classes related thereto. Certain of these divisions are not applicable where specific division sheets are issued to divide particular rates, nor are they applicable on such traffic as peanuts, coal, or iron ore coke.

Also, to and from points on certain railroads in central territory and Illinois Freight Association territory, divisions of the class rates were established generally allowing the Coast Line as much as 17 percent, which was subsequently increased to as much as 20 percent. The Coast Line has continued to negotiate for better divisions, contending that it is entitled to the 29885 basis since the northern lines have that same basis to the South from the border and related points.

The Coast Line stations between Petersburg and Jarratt, which intermediate stations are not covered by this complaint, are subject to the 29885 basis, whereas Jarratt and Petersburg, for which 29885 divisions are sought, are presently subject to the official-territory divisions. This is due to moving the territorial boundary from the line of the Norfolk & Western through Petersburg to the line of

the Virginian through Jarratt, without adjusting the division sheets to reflect this change between these two points. The division sheets are the written agreements between the railroads which actually effectuate any change in divisions, and thus in this instance those points, formerly in southern territory between Petersburg and Jarratt, continue to take the 29885 divisions. Petersburg and Jarratt are interchange points and prior to moving the boundary were considered northern points and thus took official-territory divisions on traffic to and from that territory.

Another example of alleged inequality in divisions are those from Jarratt to New York compared with those from Emporia, Va., immediately south of Jarratt on the Coast Line, and only 9 miles more distant from Richmond, on traffic moving in connection with the defendants' lines north of that junction. Under the present divisions, the Coast Line receives 22 percent of the rate applying between Jarratt and New York, after first deducting the New York terminal charge which accrues to the northern lines. From Emporia, in southern territory and only 9 miles more distant from the gateway, the Coast Line receives 36 percent under the applicable 29885 basis. This inequality exists also in connection with the other border points.

Terminal charges of the northern lines of 9.2, 6.8, and 3.6 cents are deducted before prorating on traffic to and from New York, Philadelphia, and Baltimore, respectively. There is a 2-cent bridge deduction by the northern lines at Kenova, W. Va., Louisville, and Cincinnati, as well as a floatage deduction of 6.8 cents by the Chesapeake & Ohio at Newport News, Va., which accrues to the northern lines.

The eastern terminal deductions reduce the applicable percentages to something less than that published. For example, on the column 30 rate of 73 cents from Suffolk to New York via Norfolk, the deduction of the New York terminal charge of 9.2 cents reduces the percentage south of Norfolk from 20 to 17.5 percent. On traffic moving under the column 30 rate of $1.20 from Suffolk to Chicago, Ill.,

over the line of the Chesapeake & Ohio beyond Norfolk, a 2-cent bridge toll and the Newport News transfer charge of 6.8 cents, making a total of 8.8 cents, must first be deducted before applying the published percentage, which actually allows the Coast Line 16.7 percent rather than the published 18 percent.

A comparison of percentages received by the Coast Line on border intraterritorial traffic to official territory with those received by official-territory roads on similar intraterritorial traffic to the South for like distances of 50 miles from the border point to the gateway and 450 miles beyond, shows that the Coast Line would receive the minimum of 20 percent on traffic to official territory, whereas the official-territory carrier would receive 29 percent on the traffic destined to southern territory. Also, between Boston, Mass., a representative point in New England, on the one hand, and, on the other, Petersburg and Jarratt via Richmond, for the short-line distances of 25 and 53 miles, respectively, the Coast Line receives 14.8 percent under the present divisions, compared with that under the sought 29885 basis of 25 percent to and from Petersburg and 28 percent to and from Jarratt.

The Coast Line's division of the rates has gradually decreased over the years. Illustrative of this situation is a division of sixth-class rates on interritorial traffic moving between Cincinnati and Rocky Mount, N. C., a station on the Coast Line, for a distance of 120 miles south of the interchange point of Richmond and 568 miles north thereof, with the Coast Line receiving 52 percent on May 30, 1940, 38 percent under the 24160 divisions basis[4] effective May 31, 1940, and 31 percent under the 29885 basis effective July 15, 1953. The increase in the revenue north of the gateway accrued generally to the Pocahontas lines.

Another illustration is the division of rates on shipments of fertilizer materials from Hopewell, Va., to Rocky

4. Docket No. 24160, *Divisions of Rates, Official and Southern Territories*, 234 I. C. C. 175.

Mount, routed over the line of the Norfolk & Western, which is considered a northern carrier for purposes of rate divisions, to Petersburg, 9 miles, thence the Coast Line, 97 miles. Prior to the 24160 adjustment, the Coast Line's division was 79 percent and subsequent thereto it was 64 percent. Whereas under the 29885 basis it is 54 percent. Similar comparisons show that the northern lines have materially increased their divisions on traffic to the South since May 30, 1940.

Based on the traffic study referred to, it appears that 73 carloads of fertilizer materials moved from Hopewell interterritorially via Petersburg, to points on the Coast Line for distances of as much as 250 miles, of which Wilmington, N. C., is representative. On this traffic to Wilmington, the Norfolk & Western's division for 50 miles or less has increased since May 30, 1940, from 14 to 37 percent, whereas for traffic between the complained of points on the Coast Line and official territory which do not receive the benefits of the 29885 divisions, the Coast Line obtains only 20 percent of the rates for 50 miles or less. It is estimated that the divisions prescribed in dockets 24160 and 29885 have decreased the Coast Line's revenues by about $2,500,000 through October 1956, under what it would have received on the bases in effect on May 30, 1940. On the other hand, the loss of revenue to the northern lines if the Coast Line is granted the basis sought would amount to about $137,000 annually, or about two-thousandths of 1 percent of their total revenues. The greater part of the loss would be sustained by the Pocahontas lines, which are in a better financial position than the complainants.

The principal commodities originated by the Coast Line during the test period going to official territory consisted of wallboard, manufactured tobacco, leaf tobacco, forest products, furniture, peanuts, peanut hulls and meal, baskets, household goods, and mixed merchandise. The movement to the South from official territory consisted of asphalt roofing, canned goods, glass containers, fiber boxes,

sugar, refrigerators, empty cans, steel roof, alcoholic liquors, salt, and other commodities not specifically mentioned. The bulk of the movement was for distances between 100 and 600 miles. Of the total of 766 carloads of freight moved both northbound and southbound during the test period, the Coast Line received $50.76 per car, compared with $81.58 under the proposed basis.

It is estimated by the Coast Line that 75 to 80 percent of the revenue derived from less-than-carload traffic, as distinguished from the carload freight above discussed, is divided on so-called road-to-road percentages, which apparently would not be materially affected by the 29.85 basis.

General improvements on the L & N.—During the period January 1, 1946, through December 31, 1955, the L. & N. has improved its roadway by expenditures of more than $77 million for additional main running tracks, highway grade crossing eliminations, tunnel improvements, improvements to bridges, additions and extensions of freight yards, and signal and other improvements. During this same period it acquired 477 diesel locomotives, 22 steam locomotives, and some 26,000 freight cars costing more than $200 million. Its 1956 gross expenditures for additions and betterments for roadway and equipment amounted to about $26 million. On January 1, 1947, it operated 442.90 miles under centralized traffic control compared with 1,146.6 miles on January 1, 1957. In 1948 only 0.13 percent of its gross ton-miles were in diesel-electric locomotive trains, whereas by December 1956 all gross ton-miles were in such trains. The Coast Line has made similar expenditures, and these improvements have contributed to more efficient operations.

L. & N.'s terminal operations.—Approximately 93 percent of the L. & N.'s traffic with which this proceeding is concerned originates or terminates at Louisville, as much as 85 percent of which moves via Cincinnati. Approximately 66 percent of the traffic moving via Cincinnati to and from Louisville originates or terminates at the Ford

Motor Company and General Electric Company plants, which are served by this complainant over an industrial lead track approximately 6.7 miles in length, costing $452,940. One-half of this latter traffic moves inbound to the Ford Motor Company, with very little traffic moving outbound therefrom. The inbound cars require constructive placement, involving a more expensive operation than normal switching. The handling of the cars requires five engine yard crews a day for a 5-day week, plus various assistants and clerks. A minor part of their time is devoted to handling cars for other industries in the same locality.

For this complainant, the Louisville terminal is its most expensive to operate, and the Cincinnati terminal is the second most expensive. The higher costs at Louisville are due primarily to the fact that the individual industry tracks are inadequate to accommodate the present-day volume of business without frequent switching. The tracks generally cannot be enlarged because of physical obstructions, except apparently at the Ford Motor Company and the General Electric Company plants. In the Cincinnati area, with the exception of a large oil refinery and steel plant located at Covington, and Newport, Ky., the L. & N. serves directly very few industries. The yards of the various railroads entering Cincinnati are widely scattered throughout the terminal area, making the interchange of cars unusually expensive. Interchange with the defendants is performed on the north bank of the Ohio River. The L. & N. bears the considerable expense of the river crossings, involving two bridges. From De Coursey yard, where the arrival, departure, makeup and breakup of all road trains, as well as transfer cuts from connections, are performed, the interchange points on the north bank of the river are from 9.9 to 22 miles distant, the latter being to the point of interchange with the New York Central. This is the L. & N.'s heaviest point of interchange, where it connects directly with the Pennsylvania, the New York Central,

the Baltimore & Ohio, the Chesapeake & Ohio, and the Southern Railway Company, and through intermediate carriers with the Norfolk & Western and the Erie Railroad Company. Considerable overtime is regularly earned by most of the crews, which during the year 1956 averaged $29,546 per month, and more engines are required than would normally be the case because of the time-consuming distances involved in performing interchange switching through a congested area. The tracks between Louisville and Cincinnati are said to be more expensive to maintain than other main lines of this complainant because of greater than average curvatures and excessive bridges and tunnels located thereon.

These two terminals are at either end of a comparatively short road haul. At Louisville the operating cost per car (loaded and empty) is $4.46 and at Cincinnati $2.87. At this complainant's four other major terminals of Birmingham and Montgomery, Ala., Nashville, Tenn., and Corbin, Ky., the costs per car range from $1.23 to $2.64. The average cost for the six terminals is $2.52. These figures are based on 10 selected items of cost for the month of November 1956, not including, among other items, the expenses for billing, inspection, roadway and equipment maintenance, and depreciation. During May and October 1956 at Cincinnati, the L. & N. had a daily average interchange of 1,362 loaded and 83 empty cars to the Baltimore & Ohio, the Chesapeake & Ohio, the New York Central, and the Pennsylvania, and 350 loaded and 1,113 empty cars from these connections. The traffic interchanged with the New York Central, the Baltimore & Ohio, and the Erie moves over a bridge owned by the Chesapeake & Ohio, at a cost to the L. & N. of approximately $1.18 per car. This complainant owns the bridge between Newport and Cincinnati, over which it interchanges traffic with the Pennsylvania and the Norfolk & Western. In addition to the costs involved in moving the interchange traffic over two bridges, the transfers must be made at relatively slow

speeds and through congested areas. The L. & N. must also maintain its bridge over the Ohio River between Evansville and Henderson, which was constructed at a cost of $4½ million.

The Coast Line's general improvements.—From 1946 through 1955, the Coast Line made expenditures for additions and betterments to road and equipment amounting to more than $220 million, which was equal to about 255 percent of the net railway operating income for the same decade. The improvements consisted, among other things, of the construction of new yards and improvements to old yards, improvements to roadbed, better communication system, and complete dieselization of locomotives. It has abandoned unprofitable passenger and agency services, as well as unprofitable branch lines. During the period December 1944 through October 1956, it increased its ownership of freight equipment by 40.4 percent; in the same period the national average for all class I railroads showed a decrease of 3.2 percent.

Efficiency of operations.—A comparison of the density of the complainants' traffic with that of the principal defendants shows a greater density on the latter. The net ton-miles per mile of road per day for the eastern district, including the Pocahontas region, for the year 1955, was 11,953, compared with 7,921 for the L. & N., 4,806 for the Nashville, Chattanooga & St. Louis, and 5,334 for the Coast Line. This greater density affords the defendant carriers greater opportunities for handling heavier trains. Other statistical comparisons of a similar nature show, however, that the complainants have in recent years improved their operations in relation to those of the defendants.

A comparison of total operating expenses with operating revenues in 1955 shows a ratio for the eastern district, including the Pocahontas region, of 77.09 percent, and 77.68 percent for the L. & N. The Coast Line with a ratio of 83.17 percent and the Nashville, Chattanooga & St. Louis

with 83.14 percent are in a less favorable position, but they compare favorably with 82.16 percent on the Pennsylvania and 81.10 percent on the Baltimore & Ohio. The relatively low ratio for the eastern district is due mainly to the more economical operations on the Pocahontas roads. If the years of 1947-49 are used as a base or 100 percent, the complainants show a somewhat greater improvement during the succeeding years than the carriers comprising the eastern district, including the Pocahontas region. A similar comparison of transportation or variable expenses with operating revenues also indicates greater improvement on the lines of the complainants.

Using 1946 as the base year representing 100 percent, the gross investment of the carriers comprising the eastern district, including the Pocahontas region, increased 16 percent through 1955, whereas that of the L. & N., the Coast Line, and the Nashville, Chattanooga & St. Louis increased during the same period by 35, 42, and 28 percent, respectively. The Chesapeake & Ohio and the Norfolk & Western were the only defendants with an increase comparable to that of the complainants. The average rate of return for the 9-year period 1947-through 1955, for the carriers comprising the eastern district, including the Pocahontas region, was 3.51 percent, and for the complainants 3.77 percent. The Chesapeake & Ohio and the Norfolk & Western with 6.33 and 5.95 percent, respectively, and the L. & N. with 4.89 percent, have the highest rate of return of any of the individual carriers shown of record.

The traffic density of the lines of the Coast Line here directly concerned vary considerably. As a whole, the considered Coast Line routes produced tons per train-mile approximating 2,284 for the year 1955, as compared with the same period systemwide average for the Coast Line of 2.303. Gross car ton-miles per train-mile have improved from 1,719 in 1947 to 2,330 for 1956, and the gross ton-miles per train-hour increased from 27,428 in 1947 to 44,434 in 1956.

The defendants' position.—The defendants admit that the L. & N. is transporting border-point traffic into official territory, as do the northern lines to the South. The Coast Line's situation, which is slightly different, has resulted in part from moving the boundary line. In *Official-Southern Division, supra,* wherein the 29885 basis was prescribed, we adopted the territorial limits of official and southern territories as defined in *Class Rate Investigation, 1939,* 262 I. C. C. 447, 457. This had the effect of moving the dividing line south from Petersburg to the line of the Virginian through Jarratt. It changed the territorial border in Virginia to include in official territory the Coast Line stations formerly in southern territory from Jarratt to Petersburg, which as previously mentioned still take the 29885 basis because of the failure to change the division sheets. The stations from Petersburg northward to Richmond were and are in official territory. The only Coast Line stations on the new boundary line are Jarratt, Suffolk, and Norfolk. The remainder of the stations named in the complaint are located north of the boundary in official territory insofar as rates between the territories or on border-point traffic are concerned, although they are in southern territory with respect to intraterritorial rates between points in the South.

Stations on the line of the Norfolk & Western extending from the territorial boundary southward to Bristol, Va., are recognized as in official territory, and traffic between them and other points in the South are accorded the 29885 interterritorial divisions. The same is true with respect to Chesapeake & Ohio stations in southern territory. Geographically and for ratemaking purposes, the latter stations occupy the same position in southern territory as the considered Coast Line stations do in official territory. Those two carriers participate in the 29885 basis from stations geographically located with respect to border territory and the gateways generally the same as those on the Coast Line.

The defendants are opposed to granting the complainants the 29885 basis because: (1) the 29885 basis was not designed to divide the rates between two carriers in one territory versus the entire group in the other territory, with a far greater number of stations; (2) that basis was designed for average hauls not greatly different in the two territories, and not for predominantly short hauls such as those on the Coast Line and the L. & N.; and (3) the use of 50-mile blocks would tend to inflate the complaintants' relatively short hauls, to the defendants' disadvantage.

The short-line haul of the Coast Line is less than 10 percent, that of the L. & N. less than one-fourth, of that of the northern lines. The average circuity of the northern lines' routes of movement is approximately 18 percent in excess of the short-line distance, whereas the complainants' actual routes reflect practically no circuity. The 50-mile blocks prescribed for the 29885 basis would allegedly give the L. & N. 181,131 car-miles in excess of its actual car-miles of 667,866, based on the study period, whereas, because of circuity, the mileage-block method would fail to compensate the defendants for 101,155 actual car-miles. With respect to the Coast Line, the defendants state it would be paid for more than double its actual car-miles, while they would receive no compensation for 12.2 percent of their actual car-miles. These same advantages are presently accruing to the defendants on the border traffic in the reverse direction now being divided on the 29885 basis. The fact that only two carriers of the few serving the border points are complainants is not a controlling factor.

The defendants point out that on this southern border-point traffic to and from official territory, they receive revenue for their part of the haul north of the boundary on the same divisional basis as that received by the complainants. Because they serve many more stations, the defendants claim that they render a much greater service and thus are entitled to a larger share of the revenue. This argument fails to recognize the terminal and other special

services performed by the complainants. From Louisville via Cincinnati to Dayton, Columbus, and Cleveland, Ohio, Detroit and Grand Rapids, Mich., Buffalo, Syracuse, Albany, and New York, N. Y., and Boston, the L. & N.'s proportion of the rate for a haul of 110 miles is only slightly less than that of the Baltimore & Ohio for 129 miles. Between Louisville and Baltimore via Cincinnati, for a distance of 646 miles, the L. & N. receives 15 percent of the revenue for its haul of 110 miles. This is compared with 13 percent accorded the Reading Company by the Pennsylvania for a haul of 110 miles via Harrisburg, Pa., out of a total actual distance of 647 miles. From Louisville to New York City via Cincinnati, the L. & N. receive the same 13 percent as the Southern Railway Company via the same gateway. This compares with 28 percent sought under the 29885 basis. A similar comparison of the basis sought as applied to Evansville traffic indicates that the L. & N.'s revenue gain would be somewhat less than from Louisville.

Based on the movement of 1,241 carloads in which the New York Central and the L. & N. participated during the traffic-study period previously mentioned, the former's revenue division was about 60 percent as compared with 23 percent for the L. & N. It was estimated that under the sought basis, these percentages would be 51 and 35, respectively. During that same period, the New York Central handled 88 loaded cars from the border points to the North for every loaded car handled from the border points to the South.

Based on the traffic moved during the study period, the Baltimore & Ohio shows that, while the L. & N. performs 24 percent of the average haul, it receives 26.7 percent of the average revenue per car under the present divisions, which under the sought divisions would be increased to 38.9 percent. Only a small percentage of the traffic moves from L. & N. stations other than Louisville in direct interchange with the Baltimore & Ohio, and it shows a similar relationship

The Chesapeake & Ohio, the Norfolk & Western, and the Virginian are primarily concerned with the Coast Line's proposal to divide the rates between the border points and official-territory points on the 29885 basis. The divisions presently received by the Coast Line, which are the same as allowed the Southern, are on the basis now used in dividing rates between the various official-territory carriers. For example, where two lines are involved, they divide generally on a basis of 50-mile blocks plus an additional 20 miles, representing terminal costs for each line, with a minimum for each of 20 percent. These percentages are based on the actual distances over the routes of movement and are the result of individual agreements between the various carriers. As stated, bridge and terminal deductions, where applicable, are made before prorating on the percentage bases.

On traffic movements by the Chesapeake & Ohio for distances ranging from 262 to 1,149 miles, and interchanged at Richmond, the Coast Line is allowed 20 percent for its portion of the haul of 8 to 53 miles. Where the former carrier incurs a bridge toll, that charge is deducted before prorating and subsequently added to its division of the rate. An example of the above-mentioned divisional basis is traffic from Petersburg to Charleston, W. Va., over the Coast Line to Richmond, thence the Chesapeake & Ohio, under which the former carrier now receives 20 percent for a distance of 23 miles, as compared with 30 percent on the 29885 basis.

For a 25-mile haul over the line of the Seaboard Air Line Railroad Company to Richmond, thence the Chesapeake & Ohio, the former, like the Coast Line in the previous example, receives 20 percent. This same percentage is allowed the Richmond, Fredericksburg & Potomac on traffic originating at a point 17 miles from Richmond and interchanged with the Chesapeake & Ohio at the latter point. In these illustrations the Chesapeake & Ohio performs a larger portion of the total movement than is reflected in its percentage of the revenue. On traffic originating on the Chesa-

peake & Ohio at Richmond or Norfolk, for distances similar to the hauls of the Coast Line just mentioned, the New York Central, the Pennsylvania, and the Baltimore & Ohio receive the same divisions as are accorded by the Chesapeake & Ohio to the Coast Line.

The present divisions of the Coast Line and the Norfolk & Western on traffic to or from Hagerstown, Md., interchanged by these carriers at Petersburg, are 20 percent to the former for an actual distance of 23 miles, and 80 percent to the latter for 411 miles; under the 29885 basis these percentages would be 37 and 63 percent, respectively. The 29885 basis does not now apply since these stations are designated as official-territory points. The distance of 411 miles is over a circuitous route. The distance over the route via Potomac Yards, Va., is 228 miles. The Norfolk & Western's divisions with the other official-territory lines are similar to those above discussed in connection with the Chesapeake & Ohio.

An exception to the designation of the Norfolk & Western as an official-territory carrier even though the considered routes lie in the South, is its line between Roanoke, Va., and Winston-Salem, N. C., 121 miles, which takes a division of revenue on a mileage-prorate basis. Thus, for the portion of the movement from Roanoke to Winston-Salem of a shipment destined to Savannah, Ga., actual distance of 493 miles, the Norfolk & Western would receive 25 percent of the revenue, which would be 39 percent under the 29885 basis.

The Virginian's divisions with the Coast Line are generally on the same basis as previously discussed with respect to the other defendants, and are similar to those allowed the Seaboard Air Line and the Southern when they serve comparable and competitive points. The largest single movement during the period of the traffic study was 13 carloads from Pekin, Ill., to Richmond routed over the New York Central to Deepwater Bridge, W. Va., the Virginian to Jarratt, thence the Coast Line to destination. The New

York Central received 56 percent of the revenue for its service of 610 miles, the Virginian 32 percent for 361 miles, and the Coast Line 12 percent for 53 miles. Under the 2985 basis, the latter's division would be increased by about 42 percent. The Coast Line's relatively large earnings on this traffic reflect the weight given terminal cost in relation to its short haul.

The Detroit, Toledo and Ironton Railroad Company has 2,596 specially equipped cars for use in transporting automobile parts. Generally, they move loaded from Detroit to Louisville, and return empty. This type of car constitutes more than half of its owned cars operated in this area. This defendant states that the cars moving to the Ford Motor Company at Louisville are blocked by it so as to require little switching at the point of interchange in comparison with that required in connection with empty return cars. However, it appears that the L. & N. still has to perform expensive switching because not all the blocked cars go to the same destination.

As stated, whenever a bridge toll or floatage charge is incurred, it is deducted from the rate before prorating and paid to the carrier performing such service. Under this method, all carriers participating in the movement share in the cost of such charges. The bridge toll at Cincinnati has in the past differed depending on whether the traffic was moving north or south, and there is a dispute between the parties hereto as to the correct tariff charge. The necessary evidence to settle this issue is lacking on this record.

Cost evidence.—The defendants submitted cost data computed by the use of Rail Form A, a cost formula developed by our cost finding section. This formula provides for assigning the actual cost of operation, including rents and taxes for any given year, to the service units used by the railroads in producing transportation service. It is adaptable for use in ascertaining the service unit costs of a single railroad or a group of railroads collectively. In addition to distributing the operating costs, the formula pro-

vides for the inclusion of a return on the road property and equipment of the carrier or carriers. The formula determines the out-of-pocket as well as the constant portion of the operating expenses, rents, and taxes. Passenger-train and less-than-carload deficits, if any, are included in the constant costs.

The defendants computed territorial average costs by using aforementioned Form A for the eastern district railroads as a group, including and excluding the Pocahontas region, and for the southern-territory railroads as a group, based on operations for the year 1954, with expenses adjusted to the wage and price level of January 1, 1957. Data for the year 1955 were not used due to the disruption of the operations of the L. & N. by a strike in that year. In addition, 1956 systemwide operating costs were computed separately for the Pennsylvania, the Detroit, Toledo & Ironton, the L. & N., and the New York Central.

The service unit costs thus computed for the respective groups were then applied to the aforementioned traffic study made by the complainants covering the carload shipments interchanged between them and the eastern railroads during September 1955 and March 1956. Eastern-district costs were applied to that portion of the movement in official territory, in addition to which the Pocahontas-region costs were included when comparison was made with the Coast Line, and southern-region costs were applied to the L. & N. as well as to the Coast Line. The service unit costs for the individual railroads mentioned above were also applied to the traffic study. The results showed that the eastern carriers bore about 77 percent of the costs and received about 75 percent of the revenue, as compared with 23 percent of costs and 25 percent of revenue for the L. & N. For the eastern group, it was 87 percent of costs and 82 percent of revenue, as compared with 13 percent of costs and 18 percent of revenue for the Coast Line. On interchanges between the Pennsylvania and the L. & N., the former incurred 77 percent of the costs and received 76

percent of the revenue, as compared with 23 percent of the costs and 24 percent of the revenue for the latter. Interchanges between the Detroit, Toledo & Ironton with the Pennsylvania as an intermediate carrier, and the L. & N., resulted in 74 percent of costs and 70 percent of revenue for the first two roads combined, and 26 percent of costs and 30 percent of revenue for the L. & N. A comparison which included the New York Central produced similar results.

The defendants submitted also a comparison of rail territorial average costs per 100 pounds, based on movements of an assumed load of 26 tons in a boxcar. They were computed through the use of Rail Form A, as previously described, for distances up to 1,500 miles as measured in 50-mile blocks. They were computed for 1948, 1950, 1952, and 1954 on a full cost basis, increased 12 percent to reflect circuity, but excluding the passenger-train and less-than-carload deficits. They were divided into costs for southern territory, official territory, and the eastern district (including and excluding the Pocahontas region). These data show that the costs per 100 pounds for the eastern-district carriers were higher than for the southern-territory carriers. For example, at 150 miles the 1954 costs for the eastern district were 35 percent, excluding the Pocahontas carriers, and 29 percent, including the latter carriers, above the southern-territory costs.

A similar comparison for the years 1947 (adjusted to January 1, 1949) through 1955 (adjusted to January 1, 1957), used data from a published statement of the cost finding section entitled "Rail Carload Cost Scales by Territories." It reflects a more current wage and price level and is based on full costs, including passenger-train and less-than-carload deficits, plus 4-percent return after income taxes. The resulting cost relationships were similar to those in the preceding comparison.

The Coast Line submitted data for the handling of traffic from the Johns-Manville Company's plant at Jar-

ratt, which is located on the connecting line of the Virginian. The shipments from this plant represent the largest part of the Coast Line's traffic covered by this complaint. A study of 252 carload shipments in September 1955 and March 1956 developed a cost of $19.48 per carload, based on reciprocal switching charges, per diem payments, and the cost of cleaning the cars. These costs appear to be somewhat understated. No costs were determined for the line-haul movement to Richmond, interchanging with connections, or billing and accounting. For its 53-mile haul to Richmond, the Coast Line received $39.09 per car.

The L. & N. developed its full costs based on its own computation of switching costs as hereinafter described, and by making certain adjustments in the territory-wide averages submitted by the defendants on other cost items. The L. & N. made a study of yard switching operations at Louisville and Cincinnati for a week in 1957. Approximately 85 percent of this complainant's border-point traffic moves to or from Louisville through Cincinnati. The switching studies developed the time of each element of switching service, such as classification, transfer, industrial, and interchange. The resulting total of these various elements at Louisville was an average of about 29 minutes for origin or destination switching per loaded car, which was higher than that developed for the L. & N. by the defendants. The interchange switching at Cincinnati averaged slightly more than 6.5 minutes per loaded or empty car. The L. & N.'s costs at these two terminals are higher than those at its other terminals.

Certain adjustments were made in the territorywide averages used by the defendants, such as increasing the costs of the empty return of boxcars and spotting such cars and pulling them into the Louisville terminal, as well as substituting the 1956 per diem car-rental rate in lieu of the cost of ownership of freight cars. The return movement is affected by the cars specially equipped for automobile

parts, which cannot be used for return loading. The defendants did not make any adjustment in their data to cover the higher empty return costs of this type of equipment. Although it was testified that unfavorable operating conditions existed between Louisville and Cincinnati, no adjustment was made in the line-haul costs to reflect such conditions.

The L. & N. applied these computations and adjustments to their portion of the traffic to and from Louisville under the previously mentioned 2-month traffic study. The results showed, for example, that on the 1,068 carloads exchanged during the stated period between the Pennsylvania and the L. & N., the latter incurred full costs of $62.44 per carload, as compared with the average carload revenue of $63.25. Several other comparisons were made of the L. & N.'s costs with revenue on traffic interchanged during the study period with certain individual carriers, as well as with the official-territory carriers as a group, which produced results similar to that in the foregoing illustration. The only comparable cost data as between northern and southern carriers were those on the basis of the territorial or systemwide averages submitted by the defendants and above discussed.

Discussion and conclusions.—So far as appears, both the complainants and the defendants conduct their operations in an efficient manner, and all of these carriers are rendering services which are important to the public.

The complainants are presently receiving the same basis of divisions as used in dividing the official intraterritorial rates, and the defendants have submitted considerable cost evidence in support of the reasonableness of the present divisions. However, the only comparable cost data for the complainants and the defendants are on the basis of territorial or systemwide averages, which are not determinative of the costs of these particular movements.

The L. & N.'s average haul is 124 miles and that of the defendants is 472 miles. On the Coast Line traffic, dis-

tances vary from 8 to 53 miles as compared with the defendants' average of 439 miles. Thus, the complainants' hauls are relatively short when compared with those of the defendants, and it appears to us that the present divisional basis gives too little consideration to the fact that freight rates must cover terminal and interchange services as well as line-haul operations. Most of the traffic with which this proceeding is concerned is either originated or terminated on the lines of the complainants. The bulk of the traffic herein comes within the manufactures and miscellaneous commodity group, and has a high rate level as compared with coal and other commodities of lower grade.

The L. & N has a higher rate of return than the Pennsylvania, the Baltimore & Ohio, or the New York Central, but is considerably below the rate of return earned by any of the Pocahontas lines. The rate of return of the Coast Line is similar to that of the Pennsylvania and the Baltimore & Ohio. Comparisons of this nature, however, are not controlling where the issue concerns only a small segment of the carriers' traffic over a fractional part of their lines.

The evidence is clear that the 29885 basis would give the complainants no greater revenue than the defendants now receive on border-point traffic to the South, moving under similar circumstances. For example, the defendants are dividing the revenue on the 29885 basis on traffic originating at Louisville and moved by the Baltimore & Ohio to Cincinnati, thence to a point in the South, which is the same basis sought by the complainants on traffic originating at Louisville, moved by the L. & N to Cincinnati, thence to a point in official territory. The present division of revenue from the latter operation is on a mileage prorate, which we have heretofore found to be an unreasonable basis for dividing rates in instances where carriers perform a short haul as compared with the haul of other carriers. The Coast Line stations occupy a geographic position in official territory similar to that of the Norfolk & Western stations south of the border in Virginia and North Carolina, and also simi-

lar to certain of the Chesapeake & Ohio stations in southern territory, now enjoying the 29885 divisions.

The complainants' position here is not materially different from that of the defendants when the basis here sought was established on border traffic to the South in *Official-Southern Divisions, supra*, wherein the 29885 basis was prescribed on such traffic, as well as on interterritorial traffic between official and southern territories. It was made by allowing a factor equivalent to 221 miles each for origin and destination terminal service, plus the line-haul distance factors based on 50-mile blocks. This basis accords appropriate recognition to the terminal costs which, especially on the L. & N. at Louisville, are relatively high, and to the complainants' relatively short hauls.

The revenue from the less-than-carload traffic is presently divided on a so-called road-to-road basis, which means that the same percentages apply from all points on one line to all points on another via a given gateway regardless of the length of the respective hauls. The complainants point out that, because they always originate or terminate this traffic, they must bear the full cost of either pickup or delivery service, which is particularly burdensome by reason of their short-line hauls.

It is argued that the 29885 basis was designed for primary divisions between groups of railroads and would work a hardship on the defendants in causing them to prepare new subdivisions. The border traffic to the South originates on a few official-territory lines, and the revenues therefrom are presently being divided on the 29885 basis sought. That basis for the defendants herein was approved in *Official-Southern Divisions, supra*, on a record which differed little with respect to border-point traffic from that before us here. Since the primary divisions will continue to divide over the same gateways as those presently used under the 29885 basis, we are not aware of any important problem in subdividing the rates between official-territory carriers.

The defendants' request to exclude Paducah from our findings is denied, since it appears that traffic has moved from and to this point in the past and that routes are available for future movement.

There remains for determination the request for retroactive adjustment of the divisions to the date of the filing of the complaint. As pointed out, the lawfulness of the instant divisions was not placed in issue in *Official-Southern Divisions, supra.* No retroactive adjustment was sought or required in that proceeding, and no sound basis for such an adjustment in the instant divisions is afforded by the record before us.

We find that the present primary divisions of joint all-rail class and commodity rates (except those on coal, and on coke made from coal) between the points named in the complaint and official-territory points are and for the future will be unjust, unreasonable, and inequitable; and that just, reasonable, and equitable primary divisions of the rates will be divisions determined on the 29885 basis as set forth in finding 2 of *Official-Southern Divisions,* 289 I. C. C. 4, at page 9.

We further find that the assailed divisions are not shown to have been unlawful in the past.

An appropriate order for the future will be entered.

COMMISSIONER HUTCHINSON concurs in the result.

COMMISSIONER HERRING dissents.

APPENDIX D.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of January, A. D. 1960.

No. 32055

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL.

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complainants and the defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before May 6, 1960, and thereafter to apply divisions of joint all-rail class and commodity rates (except those on coal, and on coke made from coal) between the points named in the complaint herein and official-territory points on the 29885 basis set forth in finding 2 of *Official-Southern Divisions*, 289 I. C. C. 4, at page 9.

It is further ordered, That the said complainants and defendants, according as they participate in the transpor-

tation, be, and they are hereby, notified and required to cease and desist, on or before May 6, 1960, and thereafter to abstain from demanding, collecting, or receiving divisions of said joint rates upon bases other than those herein prescribed.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

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AUG 23 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 230

BOSTON AND MAINE RAILROAD, ET AL., Appellants,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILE RAILROAD COMPANY, ET AL., - - - - - Appellees.

MOTION OF APPELLEES LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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Louisville 1, Kentucky,
(Counsel of record on whom service should be made)

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 230

BOSTON AND MAINE RAILROAD, ET AL., - *Appellants,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
LOUISVILLE AND NASHVILLE RAILROAD
COMPANY, ET AL., - - - - *Appellees.*

MOTION OF APPELLEES LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Appellees, Louisville and Nashville Railroad Company (hereinafter called L. & N.) and Atlantic Coast Line Railroad Company (hereinafter called Coast Line), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move that the final judgment and decree of the District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument.

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

This action involves an attack on the order of the Interstate Commerce Commission[1] which found divisions of the joint rates involved in this proceeding to be "unjust, unreasonable, and inequitable" (p. 58a),[2] in violation of Section 1(4) of the Interstate Commerce Act,[3] and fixed the just, reasonable and equitable divisions to be observed in the future based upon the considerations required of it by Section 15(6).[4] The Court below made the following finding of fact:

> "There was evidence, typical in character and sufficient in quantity, of the nature of the traffic and operating conditions, and of the joint rates and bases of divisions, of L&N and Coast Line on the one hand, and of the participating northern railroads as a group on the other, to enable the Commission to prescribe the 29885 basis of divisions without the necessity of requiring specific evidence and separate adjudication in respect to

---

[1]Dated January 28, 1960, which, under stipulation of the parties approved by the Court below, became effective July 18, 1960, as to traffic delivered by the L. & N. and Coast Line. As to traffic delivered by the northern railroads the order is not, under the said stipulation, in effect, but the revenues of the L. & N. and Coast Line are protected by bonds fixed by the Court below. The Commission's decision is reported at 309 I.C.C. 491.

[2]Page numbers so shown, without other explanation, refer to page numbers of the Jurisdictional Statement or its Appendices.

[3]49 U.S.C. Sec. 1(4), 54 Stat. 900; reproduced herein as Appendix A.

[4]49 U.S.C. Sec. 15(6), 41 Stat. 486, reproduced in the Jurisdictional Statement, p. 3.

each division of the joint rates between each of the two southern railroads and each plaintiff." (p. 26a)

It also said ". . . we believe that the report contains sufficient findings of fact to enable the Court to perform the task assigned to it on review" (p. 13a) and that the findings of the Commission as set forth in the Court's opinion "are supported by substantial evidence" (p. 18a).

Again, and after a careful consideration of all of the questions raised by appellants, the Court concluded:

> "We are persuaded from a careful study of the record that the findings of fact made by the Commission are supported by substantial evidence and that they in turn supply a rational basis for the ultimate findings and for the order. We are further of the opinion that in arriving at its decision the Commission substantially observed the standards prescribed by the Interstate Commerce Act." (p. 28a)

The first major finding of the Commission (p. 32a) contains in it the essence of this whole proceeding. It, standing alone, points up the inequity and unlawfulness of the divisions in issue and supplies the answer to what those divisions should be. The finding reads:

> "On interterritorial traffic between official and southern territories, the rates are divided on what is known as the No. 29885 division of rates, which is on a graduating mileage-block basis of 50-mile blocks. On traffic moving between border points

and the South over an official-territory carrier, the 29885 division applies, whereas on similar traffic moving between border points and the North over a southern line, the divisions are on a mileage prorate basis. As a result, the southern carriers receive smaller divisions for comparable distances than the northern carriers. For example, the defendants divide the revenue on the 29885 basis on traffic originating at Louisville and moved by the Baltimore and Ohio Railroad Company to Cincinnati, thence to a point in the South. This is the basis sought by the complainants on traffic originating at Louisville and moved by the L.&N. to Cincinnati, thence to a point in official territory."

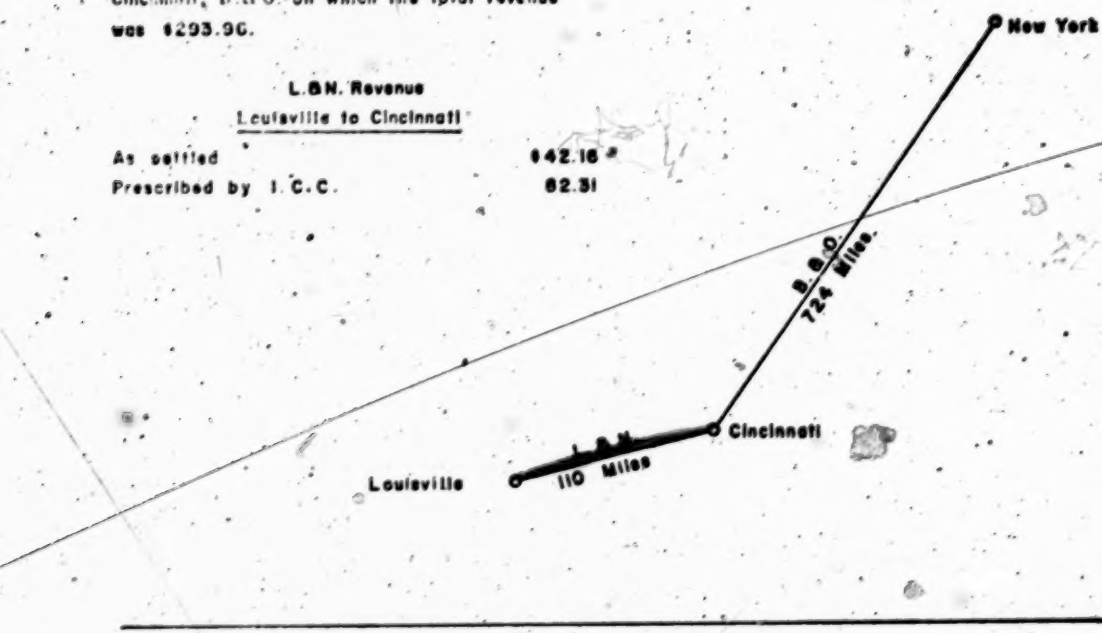
This is illustrated on the next following page, which shows that where the L. & N. performed a haul of 110 miles from Louisville to Cincinnati on a shipment to New York it received, under the basis of divisions of which it complained, $42.16 per car, whereas the B. & O. for a like haul from Cincinnati to Louisville on a shipment to New Orleans would receive $82.31, the latter being the exact amount the Commission has fixed for the L. & N. in this proceeding.

FIGURE A:

A typical movement involved in this case, I.C.C. Docket No. 32055, was a carload shipment of tractors weighing 40,269 pounds from Louisville, Ky., to New York, N.Y., via L.&N., Cincinnati, B.&O. on which the total revenue was $293.90.

L.&N. Revenue
Louisville to Cincinnati

As settled	$42.16
Prescribed by I.C.C.	82.31



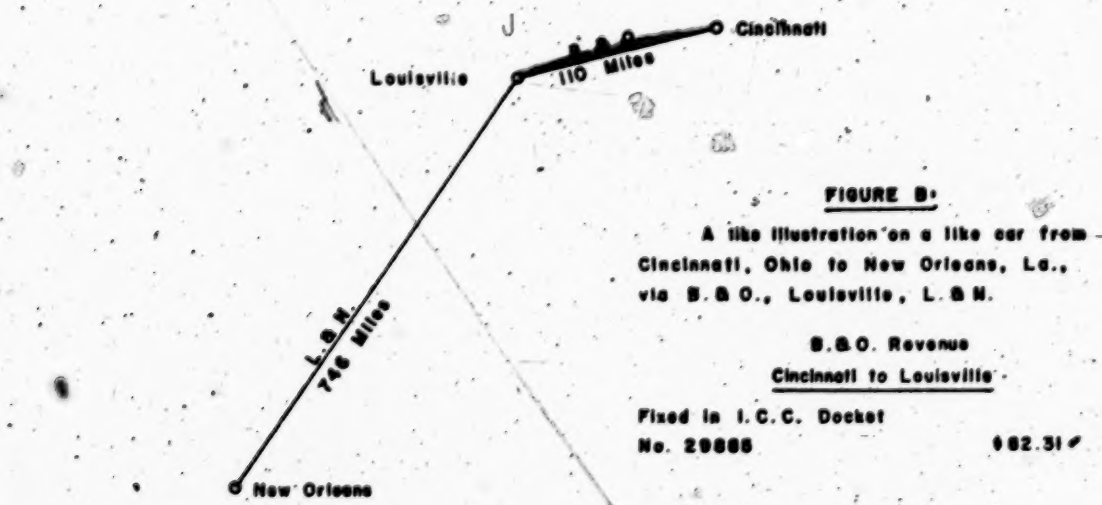


FIGURE B:

A like illustration on a like car from Cincinnati, Ohio to New Orleans, La., via B.&O., Louisville, L.&N.

B.&O. Revenue
Cincinnati to Louisville

Fixed in I.C.C. Docket No. 29888	$82.31

As to the element of relative costs, on which the appellants lay such great stress, the Court below said:

> "An examination of the massive record of the proceedings before the Commission discloses that an abundance of evidence relating to costs was introduced at the hearings before the examiner. A study of the Commission's report shows clearly that the Commission gave careful consideration to this evidence." (p. 21a)

The Court below expressly found:

> "The Commission's finding that border-point traffic to the North moves under similar circumstances as border-point traffic to the South is supported by substantial evidence. Joint rates on the latter traffic are being divided on the validly established 29885 basis of divisions." (p. 24a)

The Court also upheld the Commisison on appellants' point of non-joinder of other southern carriers in the proceeding, saying:

> ". . . The failure of such other carriers for undisclosed reasons to join in these proceedings did not preclude L&N and Coast Line from asserting their claim for relief. The joinder of the other southern carriers was not essential. The order entered by the Commission is directed to L&N, Coast Line, and the northern carriers. It does not purport to affect the division of rates between any other southern carrier and the northern railroads. *United States* v. *Abilene & So. Ry. Co.*, 1924, 265 U. S. 274, 283." (p. 28a)

We now proceed to show that none of the questions presented on appeal is substantial.

Appellants' Summary of the Essential Nature of the Questions Presented Clearly Shows Their Unsubstantiality.

At page 20 of the Jurisdictional Statement appellants bring together and epitomize the questions they raise, as follows:

> "Taken together, the questions presented by this appeal raise the eminently substantial issue whether, consistently with its statutory duty and administrative function, the Commission, in prescribing divisions of joint rates, may lawfully base its action solely upon its former conclusions on another and earlier record in another case involving other joint rates, in complete disregard of the substantially different current conditions disclosed by the later record before it."

The clearly unsubstantial character of the questions presented may at once be seen when it is pointed out that they are pitched on the wholly erroneous premise that the Commission based its decision "solely upon its former conclusions on another and earlier record in another case." *The Commission did no such thing.*

The Commission based its decision on the very full record in *this* case, as anyone may plainly and abundantly see upon a reading of the Commission's report.[1]

But the plain and simple equities of the case demanded that the Commission prescribe the same basis

[1] Appendix C to the Jurisdictional Statement.

of divisions here that it had prescribed in another and earlier case,[1] namely that covered by I.C.C. Docket No. 29885, where the appellants occupied the reverse of the position they here occupy and appellees were in the same situation as that here occupied by the appellants. This may readily be appreciated by observing the foregoing chart, on page 5.

As appears in the Commission's decision herein,[2] and indeed as has been shown hereinbefore, the No. 29885 basis of divisions is in effect, under order of the Commission, on freight jointly hauled by southern and northern railroads between the North and the South—that basis fixing the primary divisions between the two groups of railroads—and on freight which these two sets of railroads jointly move between border points,[3] on the one hand, and points in the South, on the other. It was not contemporaneously put in effect on freight moved by the same two sets of railroads between such border points, on the one hand, and points in the North, on the other, only by reason of the wholly fortuitous circumstance that divisions of joint rates on the last-named movements were not technically before the Commission,[4] although southern railroads believed they were, the Commission having ruled

[1] *Official-Southern Divisions*, 287 I.C.C. 497 (1953).

[2] Appendix C to the Jurisdictional Statement, pp. 32a, 56a and 57a. Please see also the District Court's opinion, Appendix A to the Jurisdictional Statement, pp. 13a-14a.

[3] "Border points," as used herein, means the points on the border between the North and the South. Please see Footnote 6 to the opinion of the District Court, Appendix A, p. 4a.

[4] As is explained in the opinion of the District Court at pp. 3a-5a of Appendix A of the Jurisdictional Statement.

against the position of the southern railroads on this technical point.

It was, in the view of southern railroads, a violation of Section 1(4) of the Interstate Commerce Act—that provision requiring all railroads to establish just, reasonable and equitable divisions of joint rates—for the northern railroads not to make that basis effective between such border points on the one hand, and points in the North, on the other, where northern and southern railroads participated in the movement, regardless of that ruling; and when the northern railroads refused to do so, the southern railroads here involved concluded that they had no alternative except to file the complaint[1] which gave rise to this proceeding.

So long as the divisions basis generally in effect between the South and the North, and between border points and the South, when northern and southern railroads jointly participate in the movement, is the No. 29885 basis, it naturally and logically follows that the same basis should apply between border points and the North, where northern and southern lines jointly participate in the movement. Simple fairness demands such a conclusion.

Certainly the Commission could use as a measuring rod the divisions it had heretofore prescribed for application under similar circumstances, and that were in effect on similar movements. It did no more here than that.[2] Comparison with other such divisions

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[1]Jurisdictional Statement, pp. 5a-6a.

[2]Please see to this effect its first statement in the second full paragraph on p. 56a of Appendix C of the Jurisdictional Statement.

is a well-recognized standard with the Commission. *Agwilines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 248 I.C.C. 255, 260-261 (1941); *Official-Southern Divisions*, 287 I.C.C. 497, 526-527 (1953).

Furthermore, appellants themselves placed in evidence in this case material from the record in No. 29885, the Court below stating:

> "All the parties before the Commission in this case were also parties before the Commission in Docket No. 29885. At the hearing before the examiner the plaintiffs themselves introduced in evidence (Exhibit 35) a documentary history of the divisions of border-point rates prescribed in Docket Nos. 24160 *and* 29885." (p. 23a)

The appellants, however, have ignored altogether all that this Court has said of the meaning of Sections 1(4) and 15(6), it being to the effect that their purpose, using the words of this Court, "is to empower and require the Commission to make divisions that colloquially may be said to be fair" (*Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 357 [1936]). They have insisted throughout this case—and this is their insistence here—that what those sections of the Act really mean is that the Commission should decide such a case as this one based on what they have chosen to call "matters going to relative costs of service,"[1] and that, in determining the meaning of this phrase, and giving it proper application, the Commission was

[1]This language is used in the statement of Question 2, at page 4, in the statement of Question 3, at page 5, and at page 13 of the Jurisdictional Statement. It is the creation of the appellants, not being found in either Section 1(4) or Section 15(6) of the Act.

obliged to accord controlling weight to the *particular* cost figures developed by them in this case.

The appellants indicate that the Commission in other cases has given controlling weight[1] to the element of relative cost of service. In so doing they conveniently pass by what this Court has said on the subject. The following is the clear and unmistakable language of this Court, from *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 359 (1936):

> "There is no single test by which 'just,' 'reasonable' or 'equitable' divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act."

More pointedly this Court said in *United States* v. *Abilene & Sou. Ry. Co.*, 265 U. S. 274, 284 (1924):

> "Relative cost of service is not the only factor to be considered in determining just divisions."

Please see also *The New England Divisions Case*, 261 U. S. 184, 195 (1923) and *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 116 (1928).

As the Court below correctly said:

> "The statute,[2] however, does not establish cost of service or any other factor as the primary crite-

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[1] Jurisdictional Statement, p. 13.

[2] Here the Court quoted, in a footnote, the language of Section 15(6) of the Act.

rion of fair divisions. 'Due consideration' is not the equivalent of 'primary consideration.' The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance of the various factors in any given case is peculiarly the function of the Commission." (pp. 20a, 21a)

The Commission here gave much consideration to the evidence pertaining to relative costs, the District Court having said, as we have earlier herein pointed out, that "the Commission's report shows clearly that the Commission gave careful consideration to this evidence" (p. 21a).

But the Court did not accord to appellants' cost evidence the weight appellants think should have been accorded to it. This is the essential nature of the issues appellants bring forward in their Jurisdictional Statement. They present no novel question for this Court. Basically theirs is the age-old protest of an unsuccessful litigant in a case of this kind that the expert tribunal—"appointed by law and informed by experience"[1]—has not accorded its evidence the same measure of weight that the litigant accords it and that the litigant thinks the Commission should have accorded it. But as this Court has said, in *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359 (1936), ". . . The commission alone is authorized to decide upon weight of evidence. . . ."

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[1] *Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454 (1907).

These considerations should suffice, we respectfully submit, to warrant the granting of our motion. But we reinforce them, dealing with the separate questions listed by appellants, as follows:

Questions 1, 2 and 3 Are Unsubstantial.

Appellants group as one their Questions 1, 2 and 3, asserting that they raise the issue whether the Commission may lawfully prescribe divisions "in entire disregard of the uncontroverted evidence respecting the cost relationships" (p. 13) of the involved railroads. The attack is largely upon the Commission's ruling that cost showings which represented merely "territorial or systemwide averages . . . are not determinative of the costs of these particular movements" (p. 55a), *i. e.*, the particular movements to which the joint rates involved in this case apply. The Commission has often made similar rulings. Please see, for example, *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, 218 (1939). And this Court has recognized the soundness of such conclusions. *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 380 (1936); *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 88 (1930).

As the Court below found, the L. & N. "did introduce in evidence its own actual costs in place of average costs" (p. 22a), the Court then stating:

> ". . . The costs put in evidence by N.Y.C. were unadjusted average costs for the northern railroads which did not reflect the actual costs.

> The Commission found that this evidence was not helpful in determining the costs of the particular traffic involved in this case. N.Y.C. now takes the position that the burden of adjusting the average costs presented in evidence by the *plaintiffs* was on the L & N, even though the data necessary to make these adjustments were not available to the L & N and could only be produced by the plaintiffs themselves. We think this position is untenable."

Appellants refer (pp. 17-18) to one treatment, in their studies of particular traffic involved, *i. e.*, of the movement of automobile parts from Detroit, Mich., to Louisville, Ky., via the D. T. & I.-P. R. R.-L & N., but the elements of cost shown therein were dealt with in an altogether different manner for the northern and southern carriers involved, resulting in a complete lack of comparability. Appellants say the Commission gave such evidence no consideration (p. 15), but such is not the case, since all of the "cost evidence in support of the reasonableness of the present divisions" submitted by appellants was referred to by the Commission and it held (p. 55a) that "the only comparable cost data . . . are on the basis of territorial or systemwide averages," the Commission going on to rule that such comparisons are "not determinative" of the relative costs of the involved carriers in the handling of the particular movements involved (p. 55a).

Questions 4 and 5 Are Unsubstantial.

Appellants lump together their Questions 4 and 5 and assert that they raise questions of the power of the Commission under Section 15(6) of the Interstate Commerce Act.

In their Question 4, appellants express doubt as to the power of the Commission to prescribe the divisions it has prescribed "upon the complaint of only two railroads of one group" (p. 5). As we have shown in our Opening Statement, the lower court effectively disposed of this objection, pointing out, among other things, that the order of the Commission "does not purport to affect the division of rates between any other southern carrier and the northern railroads" (p. 28a).

Question 4 also raises the issue whether there was a proper basis in the record for the prescription by the Commission of a group basis of divisions for the northern lines (p. 17). The Commission had before it a most comprehensive record—everything indeed which the involved carriers regarded as pertinent for the Commisison's consideration, including individual showings as to the traffic involved and other factors (pp. 34a-50a). As the Court below found:

> ". . . The evidence received at the hearings is contained in 823 pages of transcript and 131 exhibits, many of them of great length, consisting of massive tabulations of statistics relating to movements of traffic, costs, revenues, and divisions of joint rates both on the present and 29885 bases. . . ." (p. 6a)

Of the 131 exhibits two, Exhibits Nos. 2 (I.C.C. Tr. 13, 64) and 33 (I.C.C. Tr. 186, 191), comprised 114 large pages which, with additional thousands of pages of worksheets, made available to the parties, showed all pertinent information as to each individual car which moved between the involved points during a two-month period.[1]

Following a lengthy summarization of the Commission's report (pp. 13a-18a), the Court below found that the evidence before the Commission was "typical in character and sufficient in quantity . . . to enable the Commission to prescribe the 29883 basis of divisions," treating the northern railroads as a group (p. 26a).

Finally appellants, in Question 5, assert that the Commission inferred here (p. 17), contrary to the decision of this Court in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 117 (1928), that every existing division involved here was unjust because in the aggregate the divisions involved appeared to be unjust.

There is no basis whatever for such a charge. Here the Commission did not, as in that case, rely on averages, the Court there pointing out, at the cited page, that "averages are apt to be misleading."

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[1]The study covered 88 percent of the traffic (I.C.C. Tr. 25), the omitted 12 percent being cars moving under transit the destination of which was not then determinable (I.C.C. Tr. 26-27), and some cars moving via East St. Louis, Ill., which were later included in the record as Exhibit No. 40 (I.C.C. Tr. 359, 400). "Cars moving under transit" means cars of freight which move from an origin to an intermediate point, at which they are stopped in transit for some purpose (*e. g.*, for the processing of wheat into flour), after which the cars move to final destination.

Here, indeed, appellants are seeking to have this Court invalidate an order of the Commission chiefly because it did not accept, as controlling in the case, *appellants' averages,* which were found by the Commission not to be "determinative" on the issue of relative costs (p. 55a).

In the *Brimstone* case the Commission's order was struck down because, *inter alia,* it accepted averages "as a substitute for typical evidence as to the individual joint rates and divisions." Here there was no such substitution.

Here, as we have just shown, there was detailed evidence with respect to the joint rates and divisions applicable to the particular traffic involved, and the lower court found that the evidence presented was typical in character and sufficient in quantity to justify the prescription of the group basis determined by the Commission—which it had earlier prescribed, at the instance of the appellants, in favor of the appellants, in a situation just the reverse of that here presented.

As was said in *I.C.C.* v. *Jersey City,* 322 U. S. 503, 512-513 (1944), quoting from *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602 (1944), ". . . he who would upset the . . . order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." Certainly such a showing has not been made here. Certainly the showing is, on the contrary, that the order is just, reasonable and equitable in its consequences.

CONCLUSION.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the Court below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, R. Wray Henriott, one of the attorneys for Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of August, 1962, I served copies of the foregoing Motion to Affirm and Brief to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy each, in a duly addressed envelope, with air mail postage prepaid, to Archibald Cox, Esq., The Solicitor General, Department of Justice, Washington 25, D. C., W. Arthur Garrity, Esq., United States Attorney, Federal Building, Boston, Mass., and Paul J. Redmond, Assistant United States Attorney, Federal Building, Boston, Mass.

2. On the Interstate Commerce Commission, by mailing a copy each, in a duly addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Charlie H. Johns, Esq., Counsel, both at the offices of the Commision, Washington 25, D. C.

3. On Appellants, Boston and Maine Railroad, et al., by mailing a copy each, in duly addressed envelopes, with air mail postage prepaid, to Joseph F. Eshelman, Esq., 1600 Three Penn Center Plaza, Philadelphia 2, Pa., James Garfield, Esq., 30 State Street, Boston 9, Mass., Conrad W. Oberdorfer, Esq., 30 State Street, Boston 9, Mass., and Kenneth H. Lundmark, Esq., 466 Lexington Avenue, New York 17, N. Y.

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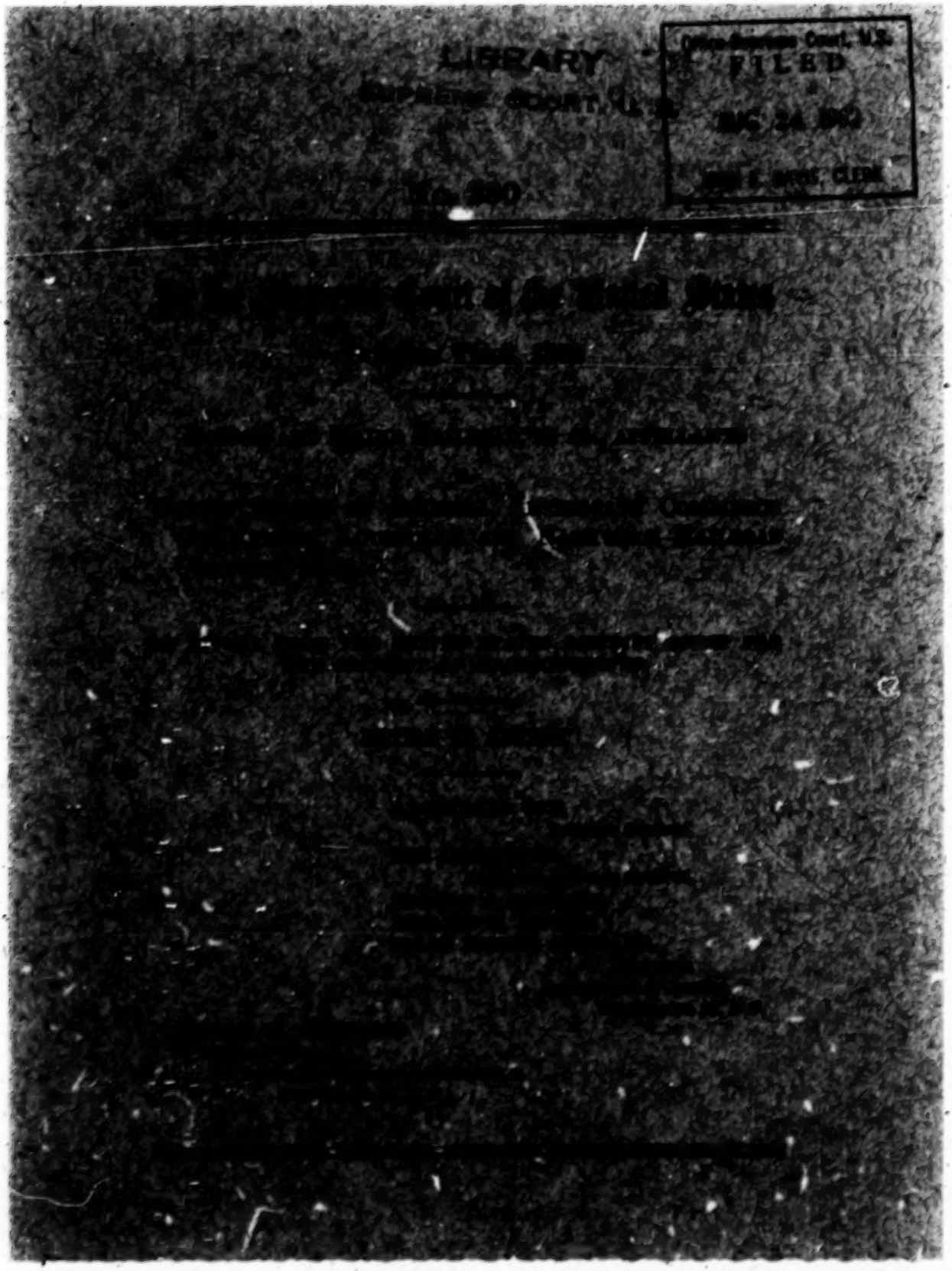
APPENDIX A.

REPRODUCTION OF STATUTORY PROVISIONS REFERRED TO IN THE BRIEF.

Title 49, U.S.C.

§ 1. *Regulation in general; car service; alteration of line—*

(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.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655848—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 230

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16, of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment (J.S.A. 29a) [1] of a three-judge district court which dismissed the complaint of the Boston and Maine Railroad and 46 other railroads and of the New York Central Rail-

[1] J.S. refers to the Jurisdictional Statement of appellants and J.S.A. refers to the appendices to such Statement.

road Company, an intervening plaintiff, seeking to set aside an order of the Interstate Commerce Commission. Pursuant to Section 15(6) of the Interstate Commerce Act (J.S. 3), the order prescribes a basis for the primary division of joint rates on traffic (except coal and coke made from coal) moving between points in the so-called "official" (northern) territory and "border points"—*i.e.*, points in a border zone between the "official" territory and the "southern" territory.[2]

The traffic involved in this case is limited to that moving from a border point over the lines of the Louisville and Nashville Railroad Co. ("L & N") or of the Atlantic Coast Line Railroad ("Coast Line") and then over the lines of one or more of the appellants to a destination in the North, or the converse. The issues here concern only a small segment of the carriers' traffic over a fractional part of their lines

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[2] The lower court defined border points (J.S.A. 4a, fn. 6) as:

"Border points are generally those points on the dividing line between official and southern territory which for rate-making and rate-division purposes are deemed to be in official territory on traffic to and from the North, and in southern territory on traffic to and from the South. The border points involved here are the following * * *:

* * * *

Louisville, Ky.	Richmond to Petersburg, Va., inclusive
Evansville, Ind.	
Henderson, Ky.	Norfolk to Suffolk, Va., inclusive
Paducah, Ky.	
Cincinnati, Ohio, including Covington and Newport, Ky.	Bruce to Marford, Va., inclusive
	Jarratt, Va."

The court also summarized the geographical areas included in "official" territory and in "southern" territory (J.S.A. 3a, fn. 5).

(J.S.A. 56a). Thus, prior orders of the Commission have determined the division of joint rates on interterritorial traffic as well as traffic moving between such border points and the South. With the present order, the Commission has established a uniform basis for the division of joint rates on all interterritorial and border point traffic.

In 1953 the Commission in Docket No. 29885 (287 I.C.C. 497; 289 I.C.C. 4)[3] prescribed a basis for the division of joint rates charged for traffic carried between points in the official and southern territories. The percentages used in making the divisions were to be constructed from certain integers which were weighted for the terminal and interlining services supplied by the carriers. Thus, an integer of 12 was assigned for each 50 miles of line haul service, and an integer of 53, equivalent to 221 miles, was assigned for terminal services at the point of origin, destination or interchange (J.S.A. 5a, fn. 7).

After the 1953 order was entered, a dispute arose between the northern and southern railroads as to whether such rate division formula applied to traffic to and from border points (J.S.A. 4a–5a). In a supplemental report, issued March 5, 1956, 298 I.C.C. 83, the Commission interpreted its 1953 order as requiring application of the formula prescribed in Docket No. 29885 to rate divisions on border point traffic moving to and from the South. The Commission, however, did not consider the order determina-

[3] This proceeding was initiated upon a petition by northern railroads to reopen I.C.C. Docket No. 24160, *Divisions of Rates, Official and Southern Territorities*, 234 I.C.C. 175 (1939).

tive with respect to similar border point movements to and from the North (J.S.A. 4a–5a). The result was that "on traffic moving between border points and points in southern territory over an official territory line the 29885 divisions applied, whereas on similar traffic moving between border points and points in official territory over a southern line the divisions were made on a mileage prorate basis which gave southern carriers smaller divisions for comparable distances than were received by northern carriers" (J.S.A. 5a).

The southern carrier-appellees in the case at bar then filed the complaint herein,[1] seeking the application of the Docket No. 29885 integer basis of rate division to border point traffic on their lines moving to and from the North. The Commission granted the requested relief, thereby establishing a uniform basis for primary rate division on interterritorial traffic, including border point traffic, moving north or south over the lines of the southern carrier-appellees and the northern carrier-appellants. The district court sustained the Commission, ruling that its decision was in accordance with Section 15(6) of the Interstate Commerce Act and that its findings were supported by substantial evidence (J.S.A. 1a).

ARGUMENT

Underlying the contentions of the appellants are the assertions that of all of the several Section 15(6)

[1] In the meantime, the Commission granted the petition of the northern lines to reopen Docket No. 29885 for further hearing. This reopened proceeding is pending in the Commission (J.S.A. 24a).

standards, relative costs must be the primary or decisive factor in determining rate divisions, and that the Commission failed to give decisive weight to the alleged relatively higher system costs of the northern carriers as a group or of individual northern carrier systems. However, Section 15(6) plainly does not make relative costs either as between individual systems or groups of systems such a primary or decisive factor. On the contrary, system costs is but one of a number of factors which Section 15(6) prescribes for "due consideration" by the Commission in its determination of rate divisions. Since it is uncontroverted that the border traffic at issue here involves relatively short hauls and relatively high cost terminal services by the two southern carriers, factors which are sufficient under Section 15(6) to support the Commission's ruling, there is no substantial question warranting plenary consideration by this Court.

1. The district court and the Commission were clearly correct in holding that the decisions of this Court in *New England Divisions Case*, 261 U.S. 184, 195; *Baltimore and Ohio Railroad* v. *United States*, 298 U.S. 349, 359; *United States* v. *Abilene and Southern Railway Co.*, 265 U.S. 274; and *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216, 223, dispose of the appellants' contention that their alleged relatively higher system costs must be afforded decisive or primary weight among the several factors set forth in Section 15(6). Section 15(6) provides a number of factors to be considered and weighed by the Commission. Included among

such factors is whether a carrier "is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, *without regard to the mileage haul*, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge." (Emphasis supplied.) Section 15(6) empowers and requires the Commission to make rate divisions "that colloquially may be said to be fair" (*Baltimore and Ohio Railroad, supra*, at 357). Even "[e]rror as to the weight to be given to financial needs, operating cost or other material facts is not a misconstruction of the Act" (*id.* at 359) or a ground for setting aside a Commission order (*New England Divisions Case, supra*, at 204). The weight and effect of the various factors and standards of Section 15(6) are for the Commission (*United States* v. *Abilene and Southern Railway Co., supra*, at 284). The appellants make no claim that the division of rates allocated to them is so low as to be confiscatory and the Commission properly found that comparisons of rates of return need not be controlling for this segment of the total traffic (J.S.A. 56a). This weighing of the various statutory factors is clearly within the authority of the Commission.

2. The uncontroverted facts are that for the border traffic here involved the L & N and Coast Line have relatively short hauls and incur relatively high cost terminal services (J.S.A. 55a–56a, 47a, 43a) and that in the period 1946 through 1955 the L & N and Coast Line have made relatively more costly improvements in their lines and in the terminals here involved (J.S.A. 15a–16a). These are factors clearly

within Section 15(6). Noting the relative length of the hauls, the district court observed (J.S.A. 14a):

> The L & N's average haul is 124 miles and that of the plaintiffs is 472 miles. On the Coast Line traffic the distances vary from 8 to 53 miles as compared with an average of 439 miles for the northern railroads. Thus the line hauls of the L & N and Coast Line are relatively short when compared with those of plaintiffs, and the present divisional basis gives too little consideration to the fact that freight rates cover terminal and interchange services as well as line-haul operations.

The Commission's findings as to the improvements made by the southern carriers in an effort to increase efficiency, as summarized by the district court, showed that (J.S.A. 15a–16a):

> During the period from 1946 through 1955 L & N and Coast Line expended very large sums for modern equipment and for other improvements on their lines which contributed to more efficient operations. By these and other means described on pages 499 and 501 of the Commission's report, L & N and Coast Line have in recent years improved their operations in relation to those of the plaintiffs, despite the fact that the principal plaintiffs enjoy a greater density of traffic on their lines which affords them greater opportunities for handling heavier trains with resulting economies.

The appellants conceded that the short haul and terminal expenses of the L & N and Coast Line were relatively heavy (J.S.A. 14a, fn. 16), and it cannot

be questioned that under Section 15(6) this factor plus the efforts to achieve more efficient operations provide a reasonable basis for rejecting a mileage or over-all system cost basis as the sole or critical standard for divisions of joint rates (see cases cited *supra*, p. 5, and *Beaumont, S.L. & W. Ry.* v. *United States*, 282 U.S. 74, 88; *Divisions of Rates, Official and Southern Territories, supra.*

3. The appellants' additional contentions, including the allegation that the Commission improperly used the Docket No. 29885 basis and the allegation that comparisons between the costs of the appellees and of individual appellants should have been given greater weight by the Commission, are further refinements of the appellants' basic but untenable contention that the Commission should have given primary and decisive weight to relative costs. They were properly rejected by the district court (J.S.A. 23a–24a).

With respect to appellants' contention that the Commission based its order upon its earlier conclusions in No. 29885 without evidence to sustain its assumption of similar circumstances, the court noted that the Commission had found that the record in No. 29885 "differed little in respect of border-point traffic from that before us here" and held the finding "supported by substantial evidence" (J.S.A. 23a). The court added that it was perfectly proper for the Commission to compare the records in the two dockets as all parties before the Commission in the instant case were also parties in No. 29885 and as the ap-

pellants themselves had introduced "a documentary history of the divisions of border-point rates prescribed in Docket Nos. 24160 *and* 29885" (J.S.A. 23a). The court stated further (J.S.A. 24a):

> The Commission's finding that border-point traffic to the North moves under similar circumstances as border-point traffic to the South is supported by substantial evidence. Joint rates on the latter traffic are being divided on the validly established 29885 basis of divisions.
>
> A validly established and currently applied basis of divisions of revenue derived from similar traffic moving in the same or adjacent territory under similar circumstances may properly be considered as a criterion, though not necessarily a controlling one, of the reasonableness of prescribing the same basis of divisions of the revenue here in issue. See *Youngstown Sheet & Tube Co.* v. *United States*, 1934, 295 U.S. 476, 480; see also *United States* v. *Northern Pacific Ry. Co.*, 1933, 288 U.S. 490, 500.

The court found that the Commission had given "careful consideration" to the "abundance of evidence relating to costs" which was contained in this "massive" record. It found further that the Commission's challenged conclusion that "the only comparable cost data for the complainants and the defendants are on the basis of territorial or system-wide averages, which are not determinative of the costs of these particular movements," was supported by substantial evidence (J.S.A. 21a). The court examined and found untenable the contention of the

New York Central that the L & N should have been required to show the actual cost of service by adjusting its cost and appellants' cost studies by means of data not available to the L & N (J.S.A. 22a). Appellants fail to present evidence to support their contention that the differences in the conditions as among the various northern carriers were such as to compel the Commission to make separate divisions of rates for each northern carrier. Indeed, the court found that the nature of the traffic and operating conditions of the northern railroads as a group was sufficiently typical to warrant adoption of the uniform basis for the division of joint rates (J.S.A. 26a). It also found no substance to the objection that the ultimate findings were not in the precise terms of the statute (J.S.A. 18a–19a), and this determination is clearly consistent with this Court's decision in *Beaumont, S.L. & W. Ry.* v. *United States, supra.*

The Commission properly selected, weighed and applied appropriate standards from and among those set forth in Section 15(6), and its determinations, supported by substantial evidence, present nothing for further review.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 230.

BOSTON AND MAINE RAILROAD ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts.

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTIONS TO AFFIRM.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 230.

BOSTON AND MAINE RAILROAD ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTIONS TO AFFIRM.

Upon the grounds set forth in their Jurisdictional Statement (JS) as supplemented by this brief, appellants oppose the motions to affirm the judgment of the United States District Court for the District of Massachusetts (JS 29a), and respectfully pray that this Court deny the motions and note probable jurisdiction. The two motions to affirm—filed jointly by appellees United States of America and Interstate Commerce Commission and jointly by appellees Louisville and Nashville Railroad Company (L&N) and Atlantic Coast Line Railroad Company (ACL)—are herein termed the motions of the Government and the L&N. They were received by appellants on August 27 and 23, 1962, respectively.

Introduction.

The motions to affirm are founded on misconceptions of the nature of the questions presented for the ruling of this Court. These questions primarily involve the interpretation of provisions of Section 15(6) of the Interstate Commerce Act (JS 2-6, 12-19) and additionally present a question of due process (JS 4, 19-20). The questions of statutory interpretation involve two different provisions: one concerning relative service costs; the other, the necessity for consideration of the relative situations of individual railroads under certain circumstances. These questions of statutory interpretation include extensions of principles already declared by this Court with which the order of the Commission and the holding of the court below in sustaining that order are in conflict.

This brief will discuss these subjects in sequence.

I. The Motions Misconceive the Nature of the Questions Which Involve Relative Costs as a Factor for Commission Consideration.

The motions to affirm rest primarily on the assumption that the questions raised by this appeal are essentially based upon contentions that the Commission must give decisive weight to relative service costs in determining divisions of joint rates.

Thus, the motion of the Government at pages 4-5 states:

> "Underlying the contentions of the appellants are the assertions that of all of the several Section 15(6) standards, relative costs must be the primary or decisive factor in determining rate divisions, and that the Commission failed to give decisive weight to the alleged relatively higher system costs of the northern carriers as a group or of individual northern carrier systems."

Other statements to the same effect appear at pages 5 and 8 of the same motion.

Similarly, the motion of the L&N at page 12 asserts:

> "But the Court did not accord to appellants' cost evidence the weight appellants think should have been accorded to it. This is the essential nature of the issues appellants bring forward in their Jurisdictional Statement."

A parallel statement appears at page 17 of this motion.

Appellees' assumption in this regard is completely in error. While the Commission itself has repeatedly emphasized the primacy of relative service costs as a criterion in the determination of lawful divisions,[1] appellants do not contend that this element must be the controlling or decisive factor, nor do they question the right and function of the Commission to decide upon the weight to be given to cost data or other evidence. Accordingly, this ground for the motions fails.

The questions of statutory interpretation here raised which involve relative costs grow out of the requirement of Section 15(6) that in prescribing and determining divisions of joint rates "the Commission shall give due consideration . . . to . . . the amount of revenue required [by the carriers concerned] to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, . . ." Concerning this provision, the report of the Commission on reconsideration in *Divisions of Freight Rates*, 156 I. C. C. 94, as written by Commissioner Eastman, concludes at pages 100-101:

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1. *New England Divisions*, 66 I. C. C. 196, 199; *Divisions of Freight Rates*, 156 I. C. C. 94, 100; 203 I. C. C. 299, 335; *Southwestern-Official Divisions*, 234 I. C. C. 135, 148; *Official-Western Trunk Line Divisions*, 269 I. C. C. 765, 776; *Official-Southwestern Divisions*, 287 I. C. C. 553, 565.

> "Relative cost of service is clearly a vital factor. Section 15(6) of the interstate commerce act specifies as matters to be considered the 'amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation' and 'whether any particular participating carrier is an originating, intermediate, or delivering line,' and these plainly are matters affecting cost of service."

The amount of revenue required to pay operating expenses, taxes, and a fair return is the equivalent of full cost, since those items are the constituents of full cost. Such items as related to all traffic and the same items as related to particular traffic, represent full costs on all traffic and on the particular traffic, respectively. Such costs when comparably computed for the "respective" individual carriers or carrier groups are *relative* costs such as the Commission has regarded as of prime importance in the determination of just and equitable divisions.[2]

The motion of the Government (p. 9) and that of the L&N (pp. 6, 12) refer to the finding of the court below that the Commission gave "careful consideration to the evidence of relative costs" (JS 21a), and thereupon assume that the questions here raised concerning that subject are thereby foreclosed. But the motions wholly overlook (1) the fact—manifest on the face of its report—that the Commission, in prescribing the divisions, gave no real or genuine

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2. See cases cited in footnote 1, page 3 above.

The provision concerning "the amount of revenue required", etc., is also commonly understood as the source of the Commission's authority, in determining what the divisions should be, to take into consideration the *financial needs* of a weaker road and to give it a division larger than justice merely as between the parties would suggest in order to maintain it in effective operation as part of an adequate transportation system, provided the share left to its connections is adequate to avoid a confiscatory result. See *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 370. When the record was made in the case under review none of the parties undertook to make a case of special financial need.

consideration to the only evidence of record dealing with the comparable, relative, or "respective" costs of the carriers, and (2) the further fact that the Commission's disregard of such evidence, and the action of the court below in upholding its order, necessarily stemmed directly from interpretations of Section 15(6) which appellants contend are inconsistent with the statute itself and the interpretations of it enunciated by this Court.

That this is a correct analysis is readily demonstrated by reference to certain important questions involving relative costs included within the scope of Questions 1, 2, and 3 (JS 4-5) and to the salient facts out of which they arise. For convenience, and to avoid confusion with the broader questions as phrased in the Jurisdictional Statement, those to be here discussed will be designated questions A, B, and C, respectively.

QUESTION A. COULD THE COMMISSION LAWFULLY PRESCRIBE AN INTERGROUP BASIS OF DIVISIONS AS SUCH IN ENTIRE DISREGARD OF UNCONTROVERTED GROUP COST RELATIONSHIPS?

This question arises out of the following principal facts:

(a) The complaint of the L&N and ACL asked the Commission to prescribe for joint rates on certain of their traffic, as between themselves individually and northern railroads as a group, the same intergroup basis of divisions it had previously fixed in No. 29885, *Official-Southern Divisions*, 287 I. C. C. 497; 289 I. C. C. 4. Their complaint did not include as complainants the other railroads of the southern group participating in similar joint rates between stations within Official (northern) territory.

(b) The 29885 intergroup divisions were originally fixed upon a consideration of northern and southern territorial group cost relationships for 1946 and 1948. While the northern costs were then higher, the Com-

mission, for reasons stated, assumed that for the future the costs in the two territories would be equal. *Official-Southern Divisions*, 287 I. C. C. 497, 526.

(c) Alleging that the Commission's forecast of an equality of group costs in the two territories had proved erroneous in the light of ascertained relationships in years subsequent to 1948, the northern railroads asked, and the Commission thereafter granted, reopening of No. 29885 for further hearing. (See JS 7 and fn. 3.)

(d) The Commission having denied appellants' petition of November 21, 1956 (filed November 23, 1956) for consolidation of the L&N complaint with No. 29885, northern lines presented uncontroverted evidence in the L&N case showing that northern territorial group costs had continued to increase relative to those of the southern territorial group, and now substantially exceed them. The Commission so found (JS 53a), and it is here so admitted (Paragraph VII of amended complaint, admitted in answer of U. S.-I. C. C.) (R. 31, 82).[3]

(e) Subsequent to the filing of exceptions to the Examiner's report and prior to the decision of the Commission herein, the northern railroads (appellants here), on September 28, 1959, filed their petition dated September 24, 1959, asking the Commission to consolidate the L&N case with No. 29885 for oral argument and disposition. That petition was grounded mainly on the facts that complainants (L&N and ACL) were seeking the 29885 group basis of divisions as such, and that the present conformity of that basis with statutory standards had been called in question and was then under investigation by the Commission. It was,

3. References to the record before the court below will be prefixed by "R"; except that references to the record before the Interstate Commerce Commission, which was introduced in evidence before the Court, will be prefixed by "IR"; no other pagings being presently available.

therefore, urged that it would be premature to extend the 29885 basis beyond its original scope prior to the conclusion of that investigation. In the alternative, northern lines offered to withdraw the petition if complainants would drop their request for 29885 divisions as such and agree to a decision on the basis of the instant record without reference to the former requirements in No. 29885. The Commission by its order of November 23, 1959, denied the petition (I. R. pleadings, Secretary's certificate, May 18, 1960, No. 24, pp. 10, 16 and No. 27).

(f) The Commisssion, as requested by the L&N and ACL, prescribed on their individual traffics against all northern lines as a group the 29885 group basis of divisions as such (JS 58a, 59a).

(g) In so prescribing such group basis of divisions the Commission admittedly gave no consideration to territorial group cost relationships on the ground that such costs "are not determinative of the costs of these particular movements" of the L&N and ACL traffic (JS 55a).

These circumstances raise the purely legal question whether the Commission, in prescribing an intergroup basis of divisions as such under Section 15(6), could make a valid order without giving due consideration to the uncontroverted evidence of relative costs bearing upon the cost relationships of the groups.

QUESTION B. COULD THE COMMISSION, CONSISTENTLY WITH THE REQUIREMENTS OF SECTION 15(6) AS INTERPRETED BY THIS COURT, LAWFULLY PRESCRIBE DIVISIONS OF JOINT RATES ON PARTICULAR TRAFFIC IN COMPLETE DISREGARD OF RELATIVE COSTS ON ALL TRAFFIC?

The principal facts out of which this question arises are as follows:

(a) Since the L&N and ACL were asking for the 29885 intergroup basis of divisions for application to

their individual traffics with the northern railroad group, northern defendants applied the appropriate territorial group costs to these respective traffics. These applications developed that the L&N and ACL proportions of total revenue under existing divisions were not less than their proportions of total costs (JS 51a-52a).

(b) Individual northern lines also adduced relative costs for their own lines and the L&N on traffic which concerned only themselves and that carrier, computed from their respective system costs. This showed that the L&N proportions of total revenue in each instance were not less than its proportion of the total costs (JS 52a-53a).

(c) The 29885 basis of divisions would produce for the L&N and ACL proportions of total revenue far greater and for northern railroads far less, than their proportions of total costs computed under either the territorial or system cost bases as above described. (Paragraph XI of amended complaint, admitted in answer of U. S.-I. C. C.) (R. 34, 82)

(d) The order of the Commission fixed the 29885 bases of inter-group divisions for the traffics of the L&N and ACL individually against all northern lines as a group and without reference to the showing of individual northern lines as against the L&N.

(e) In prescribing such divisions the Commission admittedly gave no consideration to relative costs computed on a territorial group or individual railroad system basis on the ground that such costs "are not determinative of the costs of these particular movements" (JS 55a).

The territorial group and individual carrier system costs used in northern lines' comparisons were derived from the handling of *all traffic* by the carriers as a group or individually. Viewing such costs as relative costs on all

group or system traffic—as the Commission evidently did—the question arises whether, under the requirements of Section 15(6) the Commission was at liberty to disregard such admittedly relative costs on all traffic in the prescription of divisions on the particular traffic.

This question would seem to be answered in principle, if not in terms, by the decision of this Court in *Baltimore & O. R. R. v. United States*, 298 U. S. 349. There the Court was concerned with the very language of Section 15(6) here involved—"the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation"—and with the contention of northern lines that the Commission erroneously "considered rates of return from the carriers' entire operations on all their railroad property instead of fair return from transportation of citrus fruit on the use fairly attributable to that service." In disallowing that contention the Court at page 360 held:

> "Their contention assumes and depends upon a construction of the quoted clause that would limit consideration of the return to services covered by the divisions under consideration and prohibit taking into account returns from all service. But that is not the meaning of the clause. The language, 'property held for and used in the service of transportation', is broad enough to include all carrier property. It requires no discussion to demonstrate that Section 15(6) authorizes the commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property. And unquestionably the paragraph also empowers the commission to take into account the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration."

While the Court was there dealing specifically with rate of return for all traffic as well as for the particular traffic, it is apparent that the broad construction given the provision includes as well the items of operating expenses and taxes for all traffic as well as for particular traffic, which, with a fair return, constitute full costs on all traffic and on particular traffic, respectively.

It therefore appears that, under the "due consideration" requirement of Section 15(6) the Commission was under a direct mandate to give a real and genuine consideration to relative ("respective") costs on *all traffic* as well as on the particular traffic and was not at liberty to disregard the territorial or system cost results, as it did, because it deemed them to be "not determinative of the costs of these particular movements."

Because of the similarity in the statutory standards for administrative action, the decisions of this Court in *Western Air Lines v. C. A. B.*, 347 U. S. 67, and *Delta Air Lines v. Summerfield*, 347 U. S. 74, support the principle for which *Baltimore & O. R. R. v. United States*, 298 U. S. 349, is here cited. In those cases this Court held that neither the views of the Board or the court below concerning desirable policy or statutory requirements could supersede the mandate of the statute "that the Board 'shall take into consideration' what 'the need' of the carrier is." *Delta Air Lines v. Summerfield*, 347 U. S. 74, 78. That "need", as held at page 79 of the same case, "is measured by the entirety of its operations, not by the losses of one division or department."

Accordingly, appellants submit that the conclusion of the Commission and the holding of the court below, that the Commission complied with the statute in its treatment of the admittedly comparable and uncontroverted territorial and system costs as applied to the traffics of the complainants, are contrary to the mandate of the empowering statute under the principle announced by this Court in *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 360.

QUESTION C. IN FIXING DIVISIONS ON PARTICULAR TRAFFIC COULD THE COMMISSION LAWFULLY DISREGARD THE ONLY RELATIVE COSTS ON THAT TRAFFIC?

This question arises from the following principal facts:

(a) Under the cost formula developed by the Commission's Cost Section, employed by northern lines in this case (JS 51a-53a), territorial group or individual railroad system unit costs derived from all traffic, when applied to particular traffic, develop relative costs for the particular traffic. Cf. *Official-Southwestern Divisions*, 287 I. C. C. 553, 566-568.

(b) Northern lines presented such relative costs of the particular traffics of the L&N and ACL individually as against northern lines as a group and of the individual traffics of the L&N with individual northern lines which concerned only themselves. This evidence was uncontroverted and showed proportions of total costs for the L&N and ACL not in excess of their proportions of total revenue under existing divisions (JS 51a-53a). Also under the 29885 divisions the L&N and ACL would obtain proportions of total revenue far greater, and northern lines proportions far less, than their proportions of such total costs. (Paragraph XI of Amended Complaint, admitted by answer of U. S.-I. C. C.) (R. 34, 82.)

(c) On the important Automobile Parts traffic originated by the Detroit, Toledo & Ironton (DT&I) in the Detroit area and delivered by the L&N at Louisville —which constitutes about 20 percent of the L&N traffic involved—the DT&I presented a more particularized study of relative service costs, based on the system costs of the railroads concerned but adjusted to reflect the special terminal costs of record in the Detroit area and at Louisville and also other items of corresponding nature. (IR Exhibit 126.) This disclosed a propor-

tion of total costs for the L&N not exceeding its proportion of total revenue on the Automobile Parts traffic under existing divisions. This evidence was not controverted by any cost evidence.

(d) Neither the L&N or ACL presented any cost evidence for themselves and northern railroads, as a group or individually, of a comparable or relative character despite the statutory specification of "the amount of revenue required to pay their *respective* operating expenses, taxes, and a fair return . . ." (Italics inserted.)

(e) The Commission, in fixing the 29885 group divisions for application to these particular traffics, completely disregarded all evidence of record of admittedly comparable, relative, or "respective" costs on the ground that they were "not determinative of the costs of these particular movements". (JS 55a)

This factual situation raises the purely legal question whether, in prescribing divisions of joint rates on particular traffic under Section 15(6), the Commission is at liberty to disregard—as it did—the only, and uncontroverted, evidence of record bearing on the relative or "respective" costs to the carriers concerned in the handling of that particular traffic.

Appellants make no assumption as to what the Commission's order would have been had it given due consideration to the uncontroverted evidence of relative costs as described under questions A, B, and C, above. But if, as they contend, it was the duty of the Commission to accord that evidence such consideration and to make consistent findings as to the reasons for its conclusions, its present order cannot stand. Cf. *Secretary of Agriculture v. United States*, 347 U. S. 645, 652-654.

II. The Motions Misconceive the Questions Involving the Typical Evidence Principle of the Beaumont Case.

The motions of appellees misconceive the point of appellants' questions 4 and 5 (JS 5-6, 16-19) relating to the typical evidence principle in Section 15(6) cases as announced by this Court in *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82, and, as a consequence, their comments are not pertinent.

Thus, the motion of the Government (p. 10) assumes that appellants attack the order on the ground that the Commission did not fix separate divisions or subdivisions for *each* northern railroad. The motion of the L&N (p. 15) suggests that appellants challenge (i) the power of the Commission to fix divisions "upon the complaint of only two railroads of one group", and (ii) the sufficiency of the record to permit "the prescription of a group basis of divisions for northern lines."

These assumptions miss the point of appellants' questions 4 and 5 (JS 5-6).

In essence Questions 4 and 5 challenge the power of the Commission to prescribe an intergroup basis of divisions—found reasonable by it as between individual complainants and all defendants as a group—for application to traffic in which only an individual complainant and an individual defendant participate, under the following combination of circumstances:

> (1) The joint rates involved are of intraterritorial character and have never been subject to an inter-group basis of divisions;
>
> (2) The individual defendant railroad made a separate defense of its divisions with the individual complainant and asked separate findings with respect thereto;
>
> (3) The Commission made no findings of similarity or typicality of conditions as between all de-

fendants as a group and the individual defendant making such separate defense; and

(4) The Commission made no findings—in the terms of Section 15(6)—that the existing divisions will be unjust, etc., "as between the carriers parties thereto" and that the divisions prescribed will be the just, etc., divisions "to be received by the several carriers".

Appellants' reasons for contending that under this combination of circumstances—which here obtains—the Commission's order, as respects the traffic of such individual complainant and defendant, was an invalid exercise of its authority under Section 15(6), within the principle of the Court's interpretation in *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82-83, are sufficiently set forth at pages 16-19 of the Jurisdictional Statement and need no repetition here.

III. The Due Process Point Is Not Foreclosed.

The motion of the Government (p. 10), with apparent reference to appellants' due process point (JS 4, 19-20), cites the conclusions of the court below (JS 23a, 24a) that such ultimate findings as the Commission made concerning similarity of conditions in No. 29885 and the instant case were supported by substantial evidence. Presumably the L&N motion (p. 8) relies upon a similar conclusion of the District Court (JS 28a).

Except for the superficial similarity depicted in the sketch at page 5 of the L&N motion and the mere rate comparisons contained in exhibits of the L&N and ACL, the specific facts of record—regarding conditions bearing upon the propriety of requiring the 29885 divisions in the instant case—which were found by the Commission are inconsistent with its ultimate conclusions of similarity. This is true of the Commission's findings concerning the important factor of relative group costs as contrasted with its admittedly

erroneous estimate of them in No. 29885 (JS 53a; paragraph VII of amended complaint, admitted in answer of U. S.-I. C. C., R. 31, 82), its findings concerning relative average hauls and relative circuity of actual hauls as compared with short-line distances (to which the 29885 factors are applied) (JS 47a), and its findings concerning relative volume of movements under the 29885 divisions and under those here ordered (JS 48a).

Further, the conclusion of the court below that "It was perfectly proper for the Commission to compare the records in the two dockets" can not be controlling here, since neither the record in No. 29885 nor any portions of it were introduced, designated, or identified in the record in the instant case. Further, the report of the Commission herein does not identify in any way the facts or findings therein on which it based its present decision. But assuming all the facts and findings stated in the several reports of the Commission in No. 29885 were properly officially noticed, none would support the Commission's general statements on the subject of similarity of conditions in the two proceedings nor the conclusion of the court below with reference to record support therefor.

The very ground upon which the Government (including the Commission) undertakes to support its motion emphasizes the basic failure of the Commission to accord northern railroads the essentials of due process. At page 4 of its motion the Government represents the order as establishing—in connection with the prior orders in No. 29885—"a uniform basis for the division of joint rates on *all* interterritorial and *border point traffic.*" (Italics inserted.) Thus, although the other railroads of the southern group concerned in similar rates were not parties to the L&N complaint, the order is here sought to be justified on the theory that the Commission was fixing or extending an *intergroup* basis of divisions. Yet despite this admission of the underlying basis for its order, the Commission, as made plain in its report, gave no real or genuine considera-

tion to the uncontroverted relative group costs on the ground that they were not determinative of the costs on the *particular movements* of the L&N and ACL traffic (JS 55a).

It would seem that due process would contemplate a decision on the facts of record bearing upon the issues as framed or as regarded by the Commission as crucial. Here, to meet the request of the two individual southern railroads, complainants, for an intergroup basis of divisions, northern lines presented uncontroverted evidence of relative costs both for the carrier groups and for individual lines. But despite its repeated recognition of the primacy of such evidence in divisions cases, the Commission gave no real or genuine consideration either to the group costs or the individual lines' costs in determining the divisions prescribed.

Further on this subject reference is respectfully made to the Jurisdictional Statement, pages 4 (Question 1), 9-10, 19-20.

IV. The L&N Motion Errs in Its Summary of the Questions Presented.

The L&N motion at page 7, characterizes as "appellants' summary of the essential nature of the questions presented" the issue stated under point IV of the Jurisdictional Statement on substantiality (JS 20-21). This reads:

> "Taken together, the questions presented by this appeal raise the eminently substantial issue whether, consistently with its statutory duty and administrative function, the Commission, in prescribing divisions of joint rates, may lawfully base its action solely upon its former conclusions on another and earlier record in another case involving other joint rates, in complete disregard of the substantially different current conditions disclosed by the later record before it."

This is not appellants' summary of the questions here raised nor of their essential nature. Rather it is an additional issue which arises from those presented (JS 4-6).

It is of the essence of the administrative function that determinations of a regulatory agency should reflect changing facts and conditions. Where, as here, the agency wholly disregards uncontroverted evidence of important factual conditions substantially different from those underlying its earlier determination made upon another record in another case, its unquestioning and *unexplained* acceptance of its earlier determination as a precedent for later action represents a failure to fulfill its basic function which should not escape the condemnation of this Court.

V. Supplemental Statement on Substantiality of the Questions.

The substantiality of the questions raised by this appeal is indicated at pages 12-21 of the Jurisdictional Statement, to which reference is prayed. Only a few additional matters need here be noted.

Considering the relative cost aspects of Section 15(6) Questions A and C stated above [4] are novel, and the same may be said of Question B [5] unless deemed by this Court to be ruled by the principle of *Baltimore & O. R. R. v. United States*, 298 U. S. 349, 360, as appellants contend.

As concerns the relation of the principle of the ruling of this Court in *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82-83, to Questions 4 and 5 (JS 5-6), either the principle of that ruling applies, as contended by appellants, or this Court should now declare the applicable rule.

The instant case is a particularly appropriate one for the Court's setting these several questions at rest. While the court below described the present record as "massive" (JS 21a), the record is a small one as divisions cases frequently go. Further, the more significant evidence, particularly that of relative costs, is here uncontroverted. This permits the legal questions to stand in clearer perspective.

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4. *V. supra*, pages 5 and 11, respectively.
5. *V. supra*, p. 7.

It is now a matter of many years since this Court has given consideration to the proper interpretation of Section 15(6) in its broader aspects[7] and in view of the present-day importance of divisions litigation to the railroads of the Nation, and to the Commission itself, the resolution of these various questions by this Court on this appeal would be most timely and helpful.

CONCLUSION.

For the reasons set forth in the Jurisdictional Statement and in the foregoing brief, appellants most respectfully ask that the motions to affirm filed by the United States and Interstate Commerce Commission and by the Louisville & Nashville and Atlantic Coast Line railroads be denied and that this Court note probable jurisdiction of the matter so that the case can be fully briefed and argued.

Respectfully submitted,

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7. Such few divisions cases as have had the attention of this Court subsequent to *Baltimore & O. R. R. v. United States*, 298 U. S. 349 (1936) have not required interpretation of Section 15(6). Cf. *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368 (1943); *United States v. Great No. Ry.*, 343 U. S. 562 (1952).

PROOF OF SERVICE.

I, Joseph F. Eshelman, one of the attorneys for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1962, I served the foregoing Brief of Appellants Opposing Appellees' Motions to Affirm on each adverse party by depositing in a United States mailbox a copy thereof, with first-class postage prepaid, duly addressed to counsel of record for each such party at his post office address, as follows:

1. On Appellee the United States of America, by mailing by regular-mail copies to the Honorable Archibald Cox, the Solicitor General, Lee Loevinger, Esq., Assistant Attorney General, and Robert B. Hummel, Esq., Elliott H. Moyer, Esq., and Isaac Daniel Stewart, Esq., Attorneys, Department of Justice, Washington 25, D. C., and a copy each to W. Arthur Garrity, Esq., United States Attorney, and Paul J. Redmond, Esq., Assistant United States Attorney, both at the Federal Building, Boston, Massachusetts.

2. On Appellee the Interstate Commerce Commission, by mailing by regular mail a copy to Robert W. Ginnane, Esq., its General Counsel, at the Interstate Commerce Commission, Washington 25, D. C.

3. On Appellees Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, by mailing by air mail copies to each of their attorneys, R. Wray Henriott, Esq., W. L. Grubbs, Esq., and Joseph L. Lethihan, Esq., all at 908 West Broadway, Louisville 2, Kentucky; and by mailing by regular mail a copy thereof to their attorney, James D. St. Clair, Esq., 60 State Street, Boston 9, Massachusetts.

Dated at Philadelphia, Pennsylvania, this 14th day of September, 1962.

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